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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

TRAVIS WARD,
Petitioner
v.
SENTRY TITLE CO., INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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INDEX

	Appendix	Page
Fifth Circuit Court of Appeals Opinion dated, September 26, 1983	*Appendix A*	*1*
Fifth Circuit Court of Appeals Opinion dated, March 12, 1984	*Appendix B*	*40*
District Court Findings of Fact and Conclusions of Law	*Appendix C*	*49*
Order Denying Motion for Leave to file En Banc Suggestion	*Appendix D*	*60*
Comparison of Line of Texas Supreme Court Cases Recognized by Ginter v. Taub and the Fifth Circuit in Palmer v. Fuqua to Harris v. Sentry Title Co. Illustrating Egregious, Irreconcilable Conflict Justifying Supreme Court Review or Supervision	*Appendix E*	*63*
Appellee's Suggestion for En Banc Rehearing in Light of Intervening Decision of Supreme Court of Texas	*Appendix F*	*65*
Opinions of the Supreme Court of Texas, Wilbur I. Ginter et al vs. Henry J. N, Taub	*Appendix G*	*84*

APPENDIX A

Larry D. HARRIS, Plaintiff,

v.

SENTRY TITLE COMPANY, INC., et al., Defendants-Appellants,

v.

Travis WARD, Defendant-Appellee.

No. 82-1108.

United States Court of Appeals,
Fifth Circuit.

Sept. 26, 1983.

Rehearing and Rehearing En Banc
Denied Oct. 26, 1983.

The United States District Court for the Northern District of Texas, Robert M. Hill, J., imposed constructive trust on proceeds of real property sale and awarded majority of such proceeds to party who had provided funds for down payment for original purchase of such property, and record title holder and others appealed. The Court of Appeals, Jerre S. Williams, Circuit Judge, held that duration and intensity of parties' dealings were insufficient to justify imposition of constructive trust.

Reversed and rendered.

Will, District Judge, sitting by designation, dissented and filed opinion.

1. Trusts 91

"Constructive trust" is equitable remedy that can infer fiduciary-like relationship within transaction for purpose of promoting justice and that can be imposed on parties whose course of conduct over long, preexisting period suggests that relationship of confidence and trust was assumed by parties to subject action.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts 407

In interpleader action to determine proper distribution of pro-

ceeds from foreclosure sale of real property in Texas, moved from state to federal court, controlling law was that of Texas.

3. Frauds, Statute of 71

Under Texas law, contract to convey real property normally is subject to statute of frauds and requires writing in order to be enforceable. V.T.C.A., Bus. & C. § 26.-01.

4. Trusts 17(1)

Under Texas law, creation of most trusts requires written instrument to be effective. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

5. Trusts 91

Although under Texas law creation of most trusts requires written instrument to be effective, certain trusts can be imposed as equitable judicial remedy without formal writing; such are recognized as constructive trusts. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

6. Trusts 103(1)

Under Texas law, critical requirement for recognition of constructive trust would be that parties have confidential or fiduciary relationship prior to and apart from transaction in question.

7. Trusts 103(1)

Under Texas law, confidential or fiduciary relationship warranting recognition of constructive trust may be established through prior joint business ventures, family relationships or other types of close, confidence-inducing relationships; such relationship need not arise from strict, formal fiduciary relationship, but mere subjective confidence among business associates or the like is insufficient.

8. Trusts 1, 91

"Actual trust" is established by express will of parties, while "constructive trust" is equitable remedy based on court's interest in preventing unjust enrichment rather than on legally enforceable fiduciary relationships.

See publication Words and Phrases for other judicial constructions and definitions.

9. Trusts 91

"Constructive trust" is not fiduciary relationship, but rather equitable duty.

10. Trusts 104

Under Texas law, constructive trust arises when person holding title to property is subject to equitable duty to convey it to another on ground that he would be unjustly enriched if he were permitted to retain it; such is imposed without regard to, and even despite, intention of parties.

11. Trusts 65, 85

"Resulting trust" is actual, binding trust that can develop where parties intended confidential or fiduciary relationship to develop and acted accordingly, but failed to create valid actual trust agreement; resulting trust requires evidence of shared intent to establish strict fiduciary relationship.

See publication Words and Phrases for other judicial constructions and definitions.

12. Trusts 83

Resulting trust can occur where one party buys real property with funds of another with understanding that property is being held for party that provided money.

13. Trusts 62

Resulting-trust analysis did not apply to case where no shared intent to establish strict fiduciary relationship was claimed.

14. Trusts 92½

Doctrine of constructive trust cuts through requirements of statute of frauds or parol-evidence rule that otherwise could prevent recovery in a case.

15. Trusts 91

Under Texas law, there is no "unyielding formula" for determining whether constructive trust exists on facts of particular case.

16. Trusts 103(1)

As two general prerequisites to imposition of constructive trust, Texas case law requires prior, unrelated history of close and

trusted dealings of same general nature or scope as subject transactions and finding that unjust enrichment would result if remedy of constructive trust were not imposed.

17. Trusts 110

To show constructive trust under Texas law, plaintiff must first show, by preponderance of evidence, that parties had long-standing fiduciary or confidential, trusting relationship unrelated to subject transaction.

18. Trusts 103(1)

Under Texas law, whether or not fiduciary relationship exists is question of fact, but whether relationship is sufficiently long-standing to support imposition of constructive trust is question of law.

19. Trusts 103(1)

Under Texas law, dealings between parties were not sufficiently long-standing to support application of constructive trust where acquisition of tract at issue was part of overall scheme, of six months duration, to acquire adjoining property, dealings between parties were not prior, unrelated dealings in real property but rather were part of single master plan to acquire such adjoining property and parties had had no business dealings with each other prior to dealings in connection with such plan.

20. Trusts 103(1)

Under Texas law, six-month-old plan to acquire real property does not meet kind of ongoing, confidential relationship required to support imposition of constructive trust, no matter how intertwined parties' financial scheming might be during such period.

21. Trusts 17(3)

Without written trust agreement, arrangement to hold property on behalf of another would be unenforceable under Texas Trust Act. Vernon's Ann.Texas Civ.St. art. 7425b-1 et seq.

22. Frauds, Statute of 74(1)

Under Texas law, oral contract under which party would hold title to real property on behalf of another would be unenforceable under statute of frauds. V.T.C.A., Bus. & C. § 26.01.

23. Frauds, Statute of 55

Reason for statutes of frauds is to formalize dealings in land so as to avoid inexactness and possible abuses in proving oral land contracts.

24. Trusts 17(3)

Even if there were fiduciary relationship between party who purchased real property and other party who provided down payment for purchase, duty to transfer property was unenforceable under Texas Trust Act as oral trust to convey real property. Vernon's Ann.Texas Civ.St. art. 7425b-7.

25. Implied and Constructive Contracts 3

"Unjust enrichment" is equitable principle that recognizes situations where one party has received benefit at expense of innocent other person.

See publication Words and Phrases for other judicial constructions and definitions.

26. Implied and Constructive Contracts 3

Under Texas law, mere fact that one party has made profit is insufficient ground to order restitution on theory of unjust enrichment; profit must be "unjust" under principles of equity.

27. Implied and Constructive Contracts 3

In context of unjust enrichment, there is no requirement in the law that business judgment must be logical or successful, merely that there be business purpose behind decision.

28. Equity 65(1)

Ancient precept that he who comes into equity must come with clean hands is fundamental of equity jurisprudence.

29. Implied and Constructive Contracts 3

Profits, no matter how large, do not constitute unjust enrichment unless they equitably belong to another person.

30. Trusts 95

Under Texas law, retention of profits from sale of real property by party in whose name property was originally purchased would not result in unjust enrichment sufficient to establish con-

structive trust in favor of other party who provided money for down payment for such purchase.

31. Frauds, Statute of 125(1)

Verbal promises to convey real estate are unenforceable under Texas statute of frauds. V.T.C.A., Bus. & C. § 26.01.

Vetter, Bates, Tibbals, Lee & DeBusk, J. Albert Kroemer, J. Michael Tibbals, Dallas, Tex., for defendants-appellants.

Rohde, Chapman, Ford & How, Michael E. Rohde, Lawrence McDonald Wells, Dallas, Tex., for Ward.

Appeal from the United States District Court for the Northern District of Texas.

Before WILLIAMS and JOLLY, Circuit Judges, and WILL* District Judge.

JERRE S. WILLIAMS, Circuit Judge:

This appeal is an interpleader action to determine the proper distribution of proceeds from a foreclosure sale of real property in Henderson County, Texas. The case was moved from state to federal court when the IRS asserted a claim against the proceeds, 28 U.S.C. §§ 1340, 1345, and remained there after the IRS achieved satisfaction of its claims. The district court imposed a constructive trust on the proceeds in favor of defendant-appellee Travis Ward and awarded the majority of the funds to Ward, rather than to defendant-appellant Sentry Title Company or its controlling shareholder, Alan Whatley. We find that the facts do not support the imposition of a constructive trust under Texas law and reverse the district court.

I. *Facts*

Travis Ward is a successful business and oil man in Athens, Texas. In early 1970, Ward was interested in acquiring a 490 acre tract near Cedar Creek Lake in Henderson County, Texas. The owner of the property was the Tarrant County, Texas, Water Control Board. Fearing that the price would go up if he used his own name, Ward did not want to bid for the property personally. He therefore approached Alan Whatley, a local

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*District Judge of the Northern District of Illinois, sitting by designation.

businessman who knew some members of the Water Board. Ward met in early 1970 with Whatley and Bill Hart, Whatley's attorney. Whatley and Hart agreed to help Ward submit a bid for the 490 acres. In return, Hart was to receive $30,000 to $35,000 if Ward acquired the 490 acres through these efforts. Whatley's compensation for acting on behalf of Ward was that he would receive Ward's aid in financing the purchase of a 16 acre tract in Athens, Texas. Whatley had a contract to purchase the Athens tract for approximately $80,000. Ward agreed to provide Whatley with $20,800 as a down payment on the property, which the parties agreed would be held jointly by Whatley and Ward.

Ward obtained the $20,800 through the State National Bank of Corsicana, Texas, in which Ward was the majority stockholder and a bank officer. The loan was made in Whatley's name, although Ward paid the note off out of his own funds. The district court found that this note was made in Whatley's name only because the lending officer objected to making a loan in the name of a bank officer.

On July 6, 1970, after several discussions of strategy, Hart made a bid to purchase the 490 acres from the Water Board for $480,000. The district court found this bid was made on behalf of Ward. Three other bids were made on that same date. A bid of $511,000 was submitted by Ward himself through one of his holding companies, Pan American Properties, Inc. Another bid of $771,750 was submitted by Home Engineering, Inc., a company controlled by Whatley. The district court found that this bid also was made on behalf of Ward. Finally, Spanish Shores, a company unrelated to the Ward endeavors, submitted a bid for $748,230. According to the facts as found by the district court, the Ward parties had hoped that one of their bids would be the high bid, and that any of their unnecessarily high bids could be withdrawn and still allow a Ward-related bid to win the 490 acres.

The Water Board made an initial determination that the Spanish Shores bid, although seemingly lower than the Home Engineering bid, was in fact the highest bid.[1] Ward took the two

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[1]At first glance, $771,750 is larger than $748,230. However, the conditions of the bid, including the timing of payments could make a higher dollar bid inferior to a lower but less complicated offer. For example, $10,000 today is worth more than $10,500 a year from now, at current interest rates.

highest bids to an independent bank for analysis, in an attempt to show the Water Board that the $771,750 Home Engineering bid was in fact higher than the $748,230 bid. The Water Board planned to resolve the issue on July 28.

Between July 6 and 28, Ward met twice with Whatley and Hart. They decided upon additional steps that might help Ward to emerge the victor in the bid for the 490 acres. One plan involved the Dyckman tract, a property that abutted the 490 acres and possessed an easement over that land. Whatley and Hart had tried before to acquire this property. Ward advanced Hart $600 for expenses, and Hart entered into a contract to purchase the Dyckman property for $30,500. The Dyckman property was sold on about July 24 to Home Engineering, a company controlled by Whatley. The sales price was met with a $5,000 down payment that Ward apparently furnished himself, plus a promissory note for $25,500 given to the seller. The proceeds from a later sale of the Dyckman property are the subject of this appeal.

Another leg to the July strategic maneuvers was the acquisition of the Lacy lawsuit. Jack and Pauline Lacy had owned a piece of the 490 acre tract and sold it to the Water Board. Disputes later developed, and the Lacys were contemplating suit against the Water Board. Ward believed that if he held the right to pursue the Lacy suit, his chances of winning the 490 acres would be increased. Whatley acquired the rights to pursue the Lacy suit, with the assistance of Ward's attorney, Willis Moore.

When the Water Board met on July 29, 1970, it voted to reject all bids for the 490 acres and initiate new bidding with an October 15, 1971, date. This second round produced two bids, one by Sentry Title Company, Inc., a company controlled by Whatley, and the other by an unrelated company. These bids again were rejected by the Water Board, and a third round of bids took place in February of 1972. Ward did not bid in this final round because he felt the price of the 490 acres had gotten too high for him. Sentry Title, one of Whatley's companies, submitted a bid on behalf of Whatley, not on behalf of Ward, that won the property for $807,256.

Ward has not asserted any ownership interest in the 490 acres since he dropped out of the bidding. Nor has he pursued the other

related projects that grew out of the overall scheme to buy the 490 acres, such as the Lacy lawsuit or the Athens property that Ward helped Whatley to acquire. However, Ward has asserted an equitable interest in the Dyckman property that Whatley bought in July, 1970.

The status of the Dyckman tract had changed several times after Home Engineering bought it in July of 1970. First, title was transferred from Home Engineering to Sentry Title in 1972; Sentry was also controlled by Whatley at that time. Home apparently financed a second mortgage on the property to enable Sentry to buy it. The first mortgage on the property continued, but the holder of the lien, the original owner, sold the note to Bob John Robinson. When Whatley's companies fell into financial distress and defaulted on the note, Robinson called for a foreclosure sale. The property was sold at the foreclosure sale to Travis Ward for $250,000.[2]

Ward brought this interpleader action to assert a claim to the proceeds remaining from the Dyckman tract foreclosure sale.[3] Ward claimed, inter alia, that Whatley initially bought the property as Ward's agent, and that Ward therefore was entitled to any proceeds remaining for various creditors are paid. No claims were made against Whatley personally or against Whatley's other real estate holdings. The suit was filed initially in state court, but the IRS soon joined the action to assert a tax claim, and the case was removed to federal district court, 28 U.S.C. §§ 1340, 1345. When the IRS finally received satisfaction of its claims, the district court found it would be in the interest of justice to allow the case to remain in federal court rather than delay the litigation further by a remand to state court. We find no abuse of discretion in this ruling.

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[2]Ward's ultimate ownership of the Dyckman tract is unrelated to the case before us in which Ward lays claim to the proceeds of the foreclosure sale.

[3]Some claims, including certain trustee's expenses and claims of the IRS, either have been paid from this interpleader fund already or are stipulated to be superior to Ward's claim that we examine today.

The district court found that any oral partnership arrangement that might have existed among Ward, Whatley, and Hart would be unenforceable vis-a-vis the Dyckman tract under the Statute of Frauds. It similarly determined that Texas trust law would not recognize most fiduciary relationships asserted as existing between Ward and Whatley in the absence of a written agreement. However, the court did find that the facts of the case supported the imposition of a constructive trust on the transaction.

[1] A constructive trust is an equitable remedy that can be imposed on parties whose course of conduct over a long, preexisting period suggests that a relationship of confidence and trust was assumed by the parties to the subject action. The importance of a constructive trust in this case, of course, is the fact that such trusts, although involving real property, are not subject to the statute of frauds. The district court, after providing for the payoff of certain recorded liens, judgments, and attorneys fees, awarded the bulk of the $250,000 proceeds of the Dyckman tract to Ward by imposing a constructive trust upon the proceeds.

Whatley brings this timely appeal, asking us to overturn the imposition of a constructive trust.

II. *Constructive Trusts—Generally*

[2-5] The controlling law is that of Texas. Under Texas law, a contract to convey real property normally is subject to the statute of frauds and requires a writing in order to be enforceable. Tex.Bus. & Com. Code Ann. § 26.01 (Vernon 1968). Similarly, the creation of most trusts requires a written instrument to be effective. Texas Trust Act, Tex.Rev.Civ.Stat.Ann. art. 7425b-1 et seq. (Vernon 1960). Certain trusts, though, can be imposed as an equitable judicial remedy without a formal writing. These are recognized as constructive trusts.

A constructive trust is an equitable tool in a court's power that can infer a fiduciary-like relationship within a transaction for the purpose of promoting justice. *Gordy v. Alexander,* 550 S.W.2d 146 (Tex.Civ.App.—Amarillo 1977, writ ref'd n.r.e.). "Resort is had to it in order that a statute enacted for the purpose of preventing fraud [, the statute of frauds,] may not be used as an instrument for perpetrating or protecting a fraud." *Pope v. Garrett,* 147 Tex. 18, 23, 211 S.W.2d 559, 561 (1948).

[6, 7] In recognizing a constructive trust, the critical requirement for purposes of this case is that the parties have a confidential or fiduciary relationship prior to and apart from the transaction in question. *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex. 1977); *Karnei v. Davis,* 409 S.W.2d 439 (Tex.Civ.App.—Corpus Christi 1966, no writ). This relationship may be established through prior joint business ventures, *e.g. Gaines v. Hamman,* 163 Tex. 618, 358 S.W.2d 557 (1962), family relationships, *Mills v. Gray,* 147 Tex. 33, 210 S.W.2d 985 (Tex.1948); *Ellisor v. Ellisor,* 630 S.W.2d 746 (Tex.App.—Houston [1st Dist.] 1982, no writ), or other types of close, confidence-inducing relationships. It need not arise from a strict, formal fiduciary relationship. *Meadows v. Bierschwale,* 516 S.W.2d 125, 128 (Tex.1974); *Holland v. Lesesne,* 350 S.W.2d 859 (Tex.Civ.App.—San Antonio 1961, writ ref'd n.r.e.). However, mere subjective confidence among business associates or the like is insufficient to support a constructive trust. *Consolidated Gas & Equip. Co. v. Thompson,* 405 S.W.2d 333 (Tex.1966).

[8-10] The distinction between an actual trust and a constructive trust is critical. An actual trust is established by the express will of the parties, while a constructive trust is an equitable remedy based on the court's interest in preventing unjust enrichment rather than on any legally-enforceable fiduciary relationships. A constructive trust is actually not a fiduciary relationship at all but rather an equitable duty. As explained in the Restatement of Restitution § 160, adopted by the Supreme Court of Texas in *Fitz-Gerald v. Hull,* 150 Tex. 39, 237 S.W.2d 256 (1951), a constructive trust arises when "a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." It is imposed without regard to, and even despite, the intentions of the parties.

[11-13] A constructive trust must also be distinguished from a resulting trust. A resulting trust is an actual, binding trust that can develop where the parties intended a confidential or fiduciary relationship to develop and acted accordingly, but failed to create a valid actual trust agreement. A resulting trust can occur, for example, where one party buys real property with the funds of

another with the understanding that the property is being held for the party that provided the money. The resulting trust analysis does not apply to this case, however, because it requires evidence of a shared intent to establish a strict fiduciary relationship. No shared intent to establish such a relationship is claimed in this case. The issue of resulting trust is not raised by any party.

[14, 15] The doctrine of constructive trust cuts through the requirements of the statute of frauds or the parol evidence rule that otherwise could prevent recovery in a case. *Palmer v. Fuqua,* 641 F.2d 1146, 1155 (5th Cir.1981). Yet, since this is an equitable remedy rather than a legal instrument there is no "unyielding formula" for determining whether a constructive trust exists on the facts of a particular case. *Meadows v. Bierschwale,* 516 S.W.2d 125, 131 (Tex.1974). Prior Texas cases, however, serve as important guideposts in analyzing the principal factors.

In *Consolidated Gas & Equip. Co. v. Thompson,* 405 S.W.2d 333 (Tex.1966), the Supreme Court of Texas found that the dealings between the parties failed to establish a constructive trust but showed at most either an oral contract to convey real property or an oral trust, neither of which was enforceable under the Texas Statute of Frauds or the Texas Trust Act. The case involved attempts to secure drilling rights to certain Texas oil and gas properties. The Griffiths made an agreement that they would receive a 1/16th overriding royalty from Consolidated Gas if they obtained the needed land. The Griffiths, finding that they could not secure the property in time, enlisted the aid of H.M. Thompson. They evidently promised Thompson 1/3 of their 1/16th interest. However, when Thompson obtained the rights directly for Consolidated Gas, Consolidated Gas refused to recognize any obligation to the Griffiths. The agreement between Consolidated Gas and the Griffiths was entirely oral. The Griffiths sued on a theory of constructive trust.

The Supreme Court of Texas held that no constructive trust was created under Texas law. There had been prior business dealings and the payment of finders fees between Consolidated Gas and the Griffiths. However, the court found the nature of these contracts to be sporatic. They did not meet a requirement of dealings "over a long period of time, [where] the parties had worked together for the joint acquisition and development of property

previous to the particular agreement sought to be enforced." 405 S.W.2d at 337. Stating that there was no prior fiduciary relationship between the parties, the court refused to invoke the remedy of a constructive trust. The court found that the Griffiths acquiesced in the oral nature of the agreement for the simple reason that they trusted the Consolidated Gas official. However, the court recognized "the fact that one businessman trusts another, and relies upon his promise to carry out a contract, does not create a constructive trust. To hold otherwise would render the Statute of Frauds meaningless." *Id.* at 336.

Again in *Rankin v. Naftalis,* 557 S.W.2d 940 (Tex.1977), the Supreme Court of Texas refused to impose a constructive trust on oil and gas lease transactions. The court noted that the parties had been involved in a joint venture. It also recognized that confidential relationships such as partnerships could impose a broader reach for a constructive trust than simple business dealings. However, the court found that the transactions in question were not based upon the joint venture between the parties. It refused to extend a fiduciary duty to cover the business dealings, saying: "[s]ubjective business trust, cordiality and the trust which prevails between businessmen which is the foundation of ordinary contract law" could not be a basis for imposing a trust that would thwart the statute of frauds. 557 S.W.2d at 944.

In *Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.), a pipeline contractor entered into an oral joint venture agreement with another contractor to bid on a major job. When the other contractor backed out of the joint venture, Panama-Williams brought suit seeking, inter alia, imposition of a constructive trust. The trial court gave summary judgment to the defendant, but the appellate court reversed and remanded for trial.

The appellate court recognized that a constructive trust requires "actual fraud or strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer." 576 S.W.2d at 432. The court was unwilling to find a prior fiduciary business relationship because the only business relationship was that of the joint venture made the subject of

the suit. Since the business dealings were no more long-lived than the contract in question, the court refused to find a constructive trust on that ground.

However, the court then considered the long-standing friendship between Panama Shiflett, one of the principals of Panama-Williams, and defendant Lipsey. The court found a long-standing personal relationship apart from the business dealings that influenced the scope of their business contacts. It held that the requisite fiduciary relationship could be satisfied on the basis of moral, social, domestic, or personal relationships. It did not, however, change the established Texas requirement that a claim of such a prior relationship demands strict proof in order to defeat the workings of the statute of frauds. *Id.* at 432-33.

[16] In sum, then, the Texas case law imposes two general prerequisites to the impositon of a constructive trust. The first is a prior, unrelated history of close and trusted dealings of the same general nature or scope as the subject transactions. The second is a finding that unjust enrichment would result if the remedy of constructive trust were not imposed. It is to these two inquiries that we now turn.

III. *Constructive Trust—Principles Applied*

A. Prior history of unrelated dealings.

[17-20] To show a constructive trust, a plaintiff must first show, by a preponderance of the evidence, *Putaturo v. Crook,* 653 F.2d 1027 (5th Cir.1981), that the parties had a long-standing fiduciary or confidential, trusting relationship unrelated to the subject transaction. *E.g., Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426, 432 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Tyra v. Woodson,* 495 S.W.2d 211 (Tex.1973). Whether or not a fiduciary relationship exists is a question of fact, *Smith v. Bolin,* 153 Tex. 486, 271 S.W.2d 93, 97 (1954), but whether a relationship is sufficiently long-standing to support imposition of a constructive trust is a question of law. *Fitz-Gerald v. Hull,* 150 Tex. 39, 237 S.W.2d 256, 263 (1951). We find as a matter of law that the dealings between Ward and Whatley in this case were not sufficiently longstanding to support the district court's application of a constructive trust.

First, it is clear from the undisputed evidence that the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. It is of compelling significance in this case that the dealings between Ward and Whatley were not prior, unrelated dealings in real property. Rather, they were all part of a single master plan to acquire the 490 acres. Ward and Whatley had had no business dealings with each other prior to the arrangements to acquire the 490 acres. The findings of the district court confirm that the confidential relationship between Whatley and Ward first arose when Ward became interested in the 490 acres, and that "the agreement to buy the Dyckman property was clearly within the scope of that prior agreement and made in furtherance of the prior agreement." Under such a view, it was clearly erroneous for the district court to suggest that there was any confidential or fiduciary relationship between the two parties before the overall scheme developed. *See Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426, 432 (Tex.Civ.App.—Houston [1st Dist.] 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (contemporaneous business agreements cannot support imposition of a constructive trust). The evidence in this case cannot satisfy the requisite history of prior relationships. *See* Note, *Imposition of a Constructive Trust Based Upon a Breach of a Fiduciary Duty in Joint Venture Situations,* 21 S.Tex.L.J. 229, 232-36 (1981).

Even if the Dyckman tract transaction were independent and not part of the single, overall plan to acquire the 490 acres, it would still be erroneous to create a constructive trust. Ward and Whatley discussed business for the first time in early 1970, their first meeting over the 490 acres. Their plan to acquire the Dyckman tract began in July, 1970, less than six months later. Admittedly, there were several meetings, guarantees of loans, transfers of property, and cash payments flowing between the parties during the first months of 1970. However, no matter how intertwined the parties' financial scheming might have been during that period, a six month old plan to acquire properties does not meet the kind of ongoing, confidential relationship required under Texas law to support imposition of a constructive trust. *See Tyra v. Woodson,* 495 S.W.2d 211 (Tex.1973) (business relationships

from June to October insufficient to support imposition of constructive trust). *Cf. Meadows v. Bierschwale,* 516 S.W.2d 125 (Tex.1974) (constructive trust may not require long-standing relationship where fraud is proven). Even if one were to count the additional time during which Whatley's companies held the tract, it would be difficult on the facts of this case to find a long-lasting, independent relationship between Ward and Whatley or his companies.

The district court found as a fact that Whatley acquired the Dyckman tract on behalf of Ward and with the understanding that it would be transferred to Ward. It is unclear if this finding actually is meant to cover the situation where the overall attempt to obtain the 490 acres failed. Ward, indeed, was calling the shots in mid-1970 as part of the general scheme to get the 490 acres. Ward also provided the down payment money with which Whatley bought the Dyckman tract. The district court recognized that many of the dealings between Ward and Whatley appeared to be interdependent. Most businessmen, for example, would not provide a $20,800 down payment on real estate to a virtual stranger, as Ward did for Whatley and the Athens property dealings, without some hope of personal gain.

[21-24] Whatley's own company name, however, was on the Dyckman tract deed and the mortgage. Whatley's firm, not Ward, made the mortgage payments and managed the Dyckman property, at least until the firm became insolvent.[4] We accept, nonetheless, the finding of the district court that there was an oral contract under which Whatley would hold the title to the Dyckman tract on behalf of Ward. Yet such an agreement is unenforceable under the statute of frauds for the very reason we have statutes of frauds: to formalize dealings in land so as to avoid the inexactness and possible abuses in proving oral land contracts.

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[4]It is not clear that Whatley was intending his management of the Dyckman tract to be at his own expense. On April 21, 1971, notably, Whatley sent Ward a bill for expenses in connection with their land transctions. It was not until April, 1972 that Whatley first mentioned to Ward that he considered himself, not Ward, the beneficial owner of the Dyckman tract. This conversation, in the words of the district court, led to a "physical altercation over the status of their relationship." Soon thereafter, on May 16, 1972, Ward sent Whatley

Even adding the additional finding of the district court that there was a fiduciary relationship between the two, we conclude that the duty to transfer the property is still unenforceable under the Texas Trust Act as an oral trust to convey real property. Tex.Rev.Civ.Stat.Ann. art. 7425b-7 (Vernon 1960). The business dealings between Ward and Whatley, whatever their nature, were not of sufficient duration or intensity to justify the imposition of a constructive trust. The first of the two requirements to establish a constructive trust was not met.

B. Unjust Enrichment.

The other requirement for imposition of a constructive trust is that the court's failure to intervene must cause unjust enrichment. We find this second element required to establish a constructive trust also is lacking.

[25, 26] Unjust enrichment is an equitable principle that recognizes situations where one party has received benefit at the expense of an innocent other person. The mere fact that one party has made a profit, though, is an insufficient ground to order restitution on a theory of unjust enrichment. The profit must be "unjust" under principles of equity. *See Pope v. Garrett,* 147 Tex. 18, 211 S.W.2d 559 (1948). *See generally* Restatement of Restitution § 1; 66 Am.Jur.2d Restitution and Implied Contracts § 3.

[27, 28] In the case before us, Ward was involved in covert discussions to acquire the 490 acres by rigging the bidding and without letting the Water Board know the true identity of the

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[4]*Cont'd.*

a check for the expenses listed on the April, 1971 bill. Whatley rejected Ward's check.

We do not know if the items listed on the April, 1971 bill were meant to cover all property management expenses related to the Dyckman property. Yet even if they were, this would represent nothing more than Whatley's belief at that time that he was holding the Dyckman property on behalf of Ward. Without a written trust agreement, such an arrangement would be unenforceable under the Texas Trust Act. The exception to this general rule known as "resulting trust" is not raised in this case, and this decision finds the "constructive trust" exception inapplicable.

bidder. The fact that the bidding for the 490 acres and the other tracts was made in the name of other persons was not due to any mistake, duress, or fraud. Ward was a sophisticated businessman who felt a compulsion to keep his name out of the dealings to the extent possible.[5] His decision to allow Whatley to purchase the Dyckman tract was not an oversight but an intentional business strategy. Ward may have subjectively trusted Whatley to transfer the property to him, but his failure to reduce that subjective trust to a written agreement was due to business strategy and not an equitable wrong. It is also questionable whether Ward's concealments and schemes in this deal generally leave him with the requisite "clean hands" for equitable relief.[6]

It is true that leaving the status quo undisturbed in this case will leave Whatley's company with the bulk of the $250,000 proceeds from the foreclosure sale of the Dyckman property. The tract was acquired for $30,500 during the attempt to purchase the 490 acres. Thus, it is clear that Whatley or his companies will realize a large profit from a small financial commitment. Ward points to this gain as evidence of unjust enrichment. He shows that he provided the $5,000 down payment on the property and was expecting to get title to the property in return. He

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[5]The bidding on the 490 acres was done on a blind basis. It is difficult to see how the appearance of Ward's name on the bids would influence a blind bidding scheme run by a public agency and open to the general public. However, the Water Board was not forced to accept any of the blind bids and in fact rejected the first two rounds of bidding. Ward might have held a valid belief that the presence of his name would influence the Water Board. There is, however, no requirement in the law that business judgment must be logical or sucessful, merely that there be a business purpose behind the decision.

[6]At the core of Ward's dealings with Whatley was Ward's desire to conceal his own identity from the Water Board. As part of this plan, he submitted multiple bids in different names for the same land. The district court found that his intent was to manipulate the bidding for the 490 acres and obtain the land at an advantageous price. Whether the total scheme would establish a legal offense, such as fraudulent concealment, is not before us today. However, even if the other requirements of a constructive trust were met on the facts before us, it is possible that Ward would still fail in his claims, under the ancient precept that he who comes into equity must come with clean hands, — a "fundamental of equity jurisprudence." 27 Am.Jur.2d Equity § 136, at 666-67.

feels that he, not Whatley, is entitled to the bulk of the almost ten-fold increase in the value of the Dyckman property.

[29, 30] The profit from the Dyckman property is certainly enrichment, but Ward misconstrues the meaning of the term unjust enrichment. Profits, no matter how large, do not constitute unjust enrichment unless they equitably belong to another person. *See* Restatement of Restitution § 1; 27 Am.Jur.2d Equity § 63; 66 Am.Jur.2d Restitution and Implied Contracts §§ 4-10. Ward might have provided the down payment for the Dyckman tract, but Whatley's companies made the mortgage payments and managed the property until struck by insolvency. This is not a case where one person used the funds of another for the sole purpose of acquiring property for that other person. Rather, Ward provided the down payment in the hope that the overall scheme to buy the 490 acres would bear fruit. The scheme, however, ended in abject failure. The necessary conclusion is that while there may be enrichment (profit), there has been no *unjust* enrichment in this case. This conclusion also compels the holding that the doctrine of constructive trust is inapplicable.

[31] In summary, Ward's claim for recognition of a constructive trust would fail even if he established one of the requirements but not the other. Ward, however, fails to establish either of the two requirements that would justify a constructive trust. Ward is left asserting his subjective confidence in his verbal dealings with Whatley. Verbal promises to convey real estate are unenforceable under the statute of frauds.

IV. *Conclusion*

We find that the district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman tract transactions. In addition, the court erred in ruling that Whatley and his companies would be unjustly enriched at Ward's expense if allowed to recover the proceeds of the Dyckman tract foreclosure sale. We therefore hold that it was improper to impose a constructive trust between Ward and Whatley. We do not disturb the portions of the judgment awarding certain sums such as outstanding judgments and attorneys' fees to other parties originally involv-

ed in this litigation. Those portions of the judgment were not before us.[7] We reverse that part of the judgment awarding the remainder of the interpleader fund to Ward and render judgment for that amount to Sentry Title Co., Inc., record title holder of the Dyckman property at the time of the foreclosure sale.

REVERSED and RENDERED.

WILL, District Judge, dissenting:

The majority's opinion, which reverses the decision of the District Judge who heard the evidence in this case, has the unfortunate effect of rewarding, to the tune of more than $250,000,[1] appellant Alan D. Whatley (Whatley) who made little or no investment in the nine acre tract known as the Dyckman property but who asserts beneficial ownership of that property, in an admitted breach of his fiduciary obligation to appellee Travis Ward (Ward), and in what is known in the vernacular as a "double cross." Texas law, which is controlling here, does not require this, to me, inequitable and anomalous result.

The majority reaches its conclusion by straining the Texas precedents and, I believe, providing a new statement of Texas law, in contravention of what I understand to be the limited role of federal courts in applying state law. *See Erie Railroad Co.*

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[7]The rights of several claimants were settled before the district court entered its final judgment and order. These include those of the IRS and certain lien creditors. The final judgment of the district court ruled that two parties had first rights to recover from the fund. The first was J. Lawson Goggans, the attorney for Dyckman with respect to Dyckman's efforts to collect on the Dyckman tract mortgage. Goggans may recover attorneys' fees and costs of action from the interpleader fund. The second was Larry D. Harris, who acted as substitute trustee with respect to the foreclosure sale of the Dyckman tract. Harris may also recover attorneys' fees and costs of action from the interpleader fund. Whatley and Home Engineering should recover costs of action from Ward. All other parties shall bear their own costs. The remainder of the interpleader fund shall be awarded to Sentry Title Company, Inc., record title holder of the Dyckman property at the time of the foreclosure sale.

[1]At oral argument, counsel advised that the interpleaded fund here involved, as a result of interest earned thereon, now exceeds $250,000 although the exact amount was not specified.

v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). By reversing the decision of the District Court, which the majority opinion recognizes is not clearly erroneous, the majority also exceeds, I believe, the limitations normally respected and applied by appellate courts in reviewing trial court decisions. *See* Fed.R.Civ.P. 52(a); *Bryan v. Kershaw*, 366 F.2d 497, 499 (5th Cir.1966), *cert. denied*, 386 U.S. 959, 87 S.Ct. 1030, 18 L.Ed.2d 108 (1967); *Williamson v. Brown*, 646 F.2d 196, 200 (5th Cir.1981).

The District Court's findings of fact are not challenged in this appeal. In its effort to force this case into the mold of *Consolidated Gas & Equipment Co. v. Thompson*, 405 S.W.2d 333 (Tex.1966), the majority opinion overlooks some of those facts and glosses over others in footnotes. I, therefore, undertake my own recitation of the significant facts of the case. The following narration is taken from the District Court's uncontested findings as well as from other undisputed facts.

I. THE FACTS

This interpleader action arises out of a series of transactions commencing with two or three meetings in January, February or March of 1970 between Ward and Whatley to discuss possible prospective real estate purchases. Ward, a successful business and oil man in Athens, Texas, had long been interested in acquiring some real estate in the Cedar Creek Lake area of Henderson County, Texas, 490 acres of which were owned by the Tarrant County Water Control and Improvement District Number One (Water Board). Whatley was a successful land developer in the area around Henderson County. Since the 1960's, Ward had been acquainted with, and on occasion represented by, one William F. Hart (Hart), an attorney and former Henderson County Judge. Ward and Hart and Ward and Whatley had conversed in 1969 about a $50,000 loan from the State National Bank (State National), in Corsicana, Texas, of which Ward was Chairman of the Board. The loan, which fell through, was intended to be used by a 50-50 partnership of Hart and Whatley to purchase property along Cedar Creek Lake.

The next time Ward and Whatley met was in early 1970. One of the subjects discussed at that time was the 490 acre tract own-

ed by the Water Board. On January 30, 1970, Whatley made the first of a number of offers or bids to the Water Board for the 490 acre tract.

At some of the Ward-Whatley meetings, Hart, who was acting as Whatley's attorney, and Ward's attorney Willis Moore (Moore) were also present. They discussed, among other things, the possibility of Ward's acquiring the 490 acres and the acquisition by one or the other or jointly of other properties including 16 acres in downtown Athens, Texas known as the LaRue tract and 9 acres adjoining the 490 acre tract. The 9 acres were known as the Dyckman property and possesed an easement over the 490 acres owned by the Water Board.

As one result of these conversations, Home Engineering, Inc. (Home) owned by Whatley, received the proceeds of a loan in the amount of $20,800 from State National on Ward's oral assurances that he would pay the note himself and the bank would get its money back. That money was used by Whatley in the acquisition on April 2, 1970 of the LaRue property in Athens, the total purchase price of which was approximately $80,000. The loan was made in the name of Home and guaranteed by Ward, though all understood that Ward would pay it, since Ward was an officer and the principal stockholder of State National. Ward obtained a renewal of that loan on October 8, 1970 and ultimately did pay it off. The LaRue property was later conveyed without Ward's knowledge by Home to A.D.W. Enterprises (ADW), another Whatley-owned company, which later conveyed it to Computer Land Title, Inc. (Computer), another Whatley company. The deed of conveyance from Home to ADW was not recorded until some eight months after its purported date.

The District Court found that during the conversations in early 1970, Whatley and Hart agreed to help Ward submit a bid on the 490 acres in return for which Hart was to receive $30,000 to $35,000 if Ward obtained the tract and Whatley was to be compensated by Ward's paying off the $20,800 loan to Home, which he ultimately did. For various reasons, including Ward's fear that the price would go up if his interest was disclosed, it was proposed to make the bids on the 490 acres in other persons' names.

Accordingly, on July 6, 1970, a bid of $480,000 for the 490

acres was submitted to the Water Board by Hart for Ward as the undisclosed principal. Also on July 6, Ward submitted a bid of $511,000 in the name of one of his own companies, Pan American Properties, and Home submitted a bid of $771,750 also for Ward as the undisclosed principal. The plan was that, if Pan American Properties' bid was the second highest, Home would withdraw its bid. If no other bids were received, presumably both Home and Pan American would withdraw their bids. The plan failed when a fourth bid of $748,230 was also submitted on July 6 which the Water Board determined to be the most advantageous to it of the four bids submitted.

Between July 6 and July 28, 1970, Ward, Whatley and Hart had two meetings at which they discussed the possibility for tactical purposes of acquiring the Dyckman property with its easement over the 490 acre tract. Whatley and Hart had earlier entered into negotiations with Dyckman to purchase the 9 acres. About July 24, Home acquired the Dyckman property for $30,500 with a down payment of $5,000 provided by Ward and a promissory note executed by Home in the amount of $25,500 and secured only by a vendor's lien and deed of trust on the property. Ward also gave Hart $600 to pay for travel expenses in connection with the acquisition of the Dyckman property.

Hart flew to Canada to meet with Dyckman and took with him a cashier's check for the $5,000 arranged for by Ward. Whatley later contended that the $5,000 was a loan which he repaid on November 16, 1970 by conveying, at Ward's request, a lake lot he owned worth between $4750 and $6500 to Ward's friend, M.O. Atterbury. Ward denied that the $5,000 was a loan or that the transfer to Atterbury was its repayment. The District Court which heard the evidence found that Home through Hart had acquired the Dyckman property on behalf of Ward and that the conveyance to Atterbury was not in repayment of the $5,000.

At about the same time, June-July 1970, Ward, Whatley and Hart agreed that they would attempt, also for tactical purposes, to acquire a possible lawsuit against the Water Board with respect to 29 of the 490 acres which the Water Board had purchased from Jack and Pauline Lacy (the Lacys). The objective was to enhance their efforts to acquire the 490 acres for Ward. The theory of the lawsuit was that the Lacys were entitled to a reversion of ti-

tle to the 29 acres because of certain alleged misrepresentations made to them by the Water Board at the time of condemnation. Ward, Whatley and Hart agreed that the Lacys should be offered $10,000 payable when and if the suit was won plus any amounts they had to repay the Water Board for the reversion. Ward was to and did pay all expenses in connection with the suit.

In August 1970, Whatley acquired the right to file the suit in the Lacys' name and Moore, Ward's attorney filed it. Later, another attorney was retained and also paid by Ward to assist Moore in prosecuting the suit. In June 1971, Moore and Ward attempted unsuccessfully to negotiate a settlement of the suit as part of Ward's acquisition of the 490 acres.

At the July 29, 1970, meeting of the Water Board, all the July 6 bids for the 490 acres were rejected and new bids were set to be received some fifteen months later on October 15, 1971. On that date, two bids were submitted. One, by Whatley, with Sentry as the nominal bidder, was for $750,000. The second bid was for $801,150. Both were rejected and on February 10, 1972 yet another set of bids was taken by the Water Board and three bids were received. Sentry's bid of $807,256 was high and the property was sold to Sentry on May 25, 1972. Sentry both on October 15, 1971 and on February 10, 1972 was bidding for Whatley and not for Ward. Ward did not bid at either date on the 490 acres because he believed the price sought by the Water Board was too high.

In April 1972, twenty-one months after its acquisition by Hart for Ward in Home's name, Whatley for the first time advised Ward that he did not recognize that Ward had any interest in the Dyckman property which had been acquired on July 24, 1970, and later conveyed by Home to Sentry after the latter was organized. Prior to April 1972, Ward had not been aware that Home and Whatley were claiming any interest in the Dyckman property adverse to his. In fact, a year earlier on April 21, 1971, Whatley had sent Ward a bill for expenses he had incurred in connection with both the LaRue (Athens) and Dyckman properties, including the first interest payment on the $25,500 note, presumably on the premise that the expenses had been incurred for Ward's benefit as the beneficial owner. *See* District Court Findings of Fact # 27.

At Moore's instigation, Ward, Whatley, Moore and Hart met some time after Whatley, in April 1972, advised Ward that he did not recognize any interest of Ward in the Dyckman property. At that meeting, Ward and Whatley came to blows and no agreement was reached. On May 16, 1972, Ward sent Whatley a check for $18,672.50 to cover all past and future interest payments and other expenditures which Whatley would make on the Dyckman property. *See* Tr. 175-78. Whatley returned the check.

In August 1972, Ward filed suit in Henderson County against Whatley, Home, and Community Engineering, Inc. (Community), another Whatley company, asserting an equitable claim to the Dyckman property. Later he joined Sentry, to whom Home had conveyed the property, as a defendant.Sentry defaulted in that action, Ward nonsuited the other defendants and obtained a default judgment against Sentry which became final. He then immediately refiled against the other defendants. At the time Home conveyed the Dyckman property to Sentry, January 22, 1973, Ward's suit was on file and constituted notice to Sentry of his claim to an interest in the property.

Subsequently, in 1973, when Ward learned that Home had conveyed the Dyckman property to Sentry and that Dyckman was about to foreclose his vendor's lien and trust deed since payments on the note were in default, at Moore's suggestion, Ward agreed to purchase the $25,500 Dyckman note. Moore was concerned that a bona fide purchaser might defeat Ward's equitable claim to the property being asserted in the pending lawsuit. Ward and Moore arranged for one John Bob Robinson (Robinson) to attempt to acquire the note from Dyckman. Robinson did so and subsequently assigned the note to Ward. Ward's recollection was that he, through Robinson, paid Dyckman some $38,000 for the note which had a provision for increase in principal to reflect changes in the Consumer Price Index. *See* Sentry Exh. # 5.

At the foreclosure sale, Moore bid $250,000 for the Dyckman tract on behalf of Ward and obtained a Substitute Trustee's Deed to the property. It is the entitlement to the net proceeds of that transaction which is the subject matter of this lawsuit.

As indicated, this is an interpleader action brought originally

by Larry D. Harris (Harris), the trustee under the foreclosed Deed of Trust and the holder of the proceeds of the sale of the Dyckman property. Harris sought a determination of the owner of the net proceeds of the $250,000 from the foreclosure sale at which Moore on behalf of Ward bought the property. The proceeds were placed in the registry of the court. After allowing claims of the IRS for taxes and attorneys' and trustee's fees, the District Court entered Findings of Fact and Conclusions of Law awarding the net proceeds to Ward. It is from that award that Sentry, Home and Whatley appeal.

II. THE LAW

Several basic questions of Texas law are here involved. The Texas Statute of Frauds, Tex.Bus. & Com.Code Ann. sec. 26.01 (Vernon 1968), provides in relevant part that no action shall be brought in any court upon a contract for the sale of real estate or the lease thereof for a term longer than one year unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged. And the Texas Trust Act, Tex.Rev.Civ.Stat.Ann. art. 7425b-1, *et seq.* (Vernon 1960) provides in relevant part that no trust in relation to or consisting of real property shall be valid unless created, established or declared by a written instrument subscribed to by the trustor or by his agent duly authorized in writing. The Trust Act, however, specifically provides that it does not apply to a constructive or resulting trust.

The District Court determined that a constructive trust existed between Ward and Whatley as to the Dyckman property. It held that Ward had established by a preponderance of the evidence, as required by *Putaturo v. Crook,* 653 F.2d 1027, 1029 (5th Cir.1981), that a confidential or fiduciary relationship existed beteen him and Whatley prior to and apart from their Dyckman property dealings, *see Consolidated Gas & Equipment Co. v. Thompson, supra,* 405 S.W.2d at 337, and that the agreement sued upon was within the scope of their prior dealings, as required by *Rankin v. Naftalis,* 557 S.W.2d 940, 944 (Tex.1977). The Court also found that it would be inequitable to permit Whatley to retain the proceeds from the sale of the Dyckman property and that, even absent a written agreement, a confiden-

tial or fiduciary relationship could arise from a purely personal or informal relationship where trust and confidence had been reposed by the parties by reason of that relationship. The Court did not discuss whether the facts here gave rise to a resulting trust, presumably because it was satisfied that they did establish a constructive trust.

The trial court found that the fiduciary relationship existed between the parties here, prior to and apart from any agreement with respect to the Dyckman property, when Whatley and Hart agreed in early 1970 to assist Ward in acquiring the 490 acres for which assistance Ward was to pay Hart $30,000-$35,000 and to pay the $20,800 loan of Home at State National which Whatley had used to acquire the LaRue (Athens) property. The trial court held further that the relationship extended to all the other ventures, such as the Lacys' lawsuit and the placing of bids with the Water Board, in which the parties joined and which were related to their efforts under the agreement to assist Ward in acquiring the 490 acres, and that to allow Whatley and Sentry any interest in the proceeds of the sale of the Dyckman property would unjustly enrich them.

Accordingly, the District Court found that Home and Whatley, as its owner, had acted in a fiduciary capacity in the acquisition of the Dyckman tract (the successful negotiations were actually conducted by Hart), and that therefore Home and subsequently Sentry held title to the property in constructive trust for Ward. Whatley's refusal in April 1972 to have Home transfer title to Ward was, accordingly, a breach of that fiduciary relationship and the constructive trust.[2]

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[2]The majority suggests that it is unclear if the District Court finding that Whatley was obligated to transfer the Dyckman property to Ward was meant to cover the situation where the efforts to obtain the 490 acres for Ward failed. The District Judge made his finding more than ten years after Ward abandoned his interest in the 490 acres. Based in part on that finding, he found that Whatley had breached his fiduciary duty to Ward in asserting a beneficial interest in the Dyckman property and refusing to convey it to Ward. I find no ambiguity in the trial judge's finding. Whatley acquired the Dyckman tract with Ward's money for his benefit and with the understanding that he was holding it for Ward regardless of what happened to the 490 acres. If Ward acquired the 490 acres or not, Whatley had no equitable right to the Dyckman property and until Spril of 1972 he claimed none.

Since it is undisputed that none of the understandings between the parties were in writing, the only question to be resolved is whether the trial court properly found that, under all the facts, a constructive trust was created or, alternatively, a resulting trust was created, or whether all that existed was an oral contract to convey real estate which is unenforceable under the Statute of Frauds or an oral trust with respect to real estate which is unenforceable under the Texas Trust Act.

As the majority recognizes, the Texas Supreme Court has recently emphasized that there is no "unyielding formula" for determining whether a constructive trust should be decreed and that the facts of each individual case must determine the appropriate relief. *Meadows v. Bierschwale,* 516 S.W.2d 125, 131 (Tex.1974). That a court of equity should respond flexibly to the facts before it, applying broad, general principles of fairness, is no recent innovation in the long development of the Texas law of constructive trusts. *See also, e.g., MacDonald v. Follett,* 142 Tex. 616, 180 S.W.2d 334, 337 (1944) ("[n]o rules can be prescribed and no attempt should be made to formulate rules for the measurement of conduct by courts of equity"); *Pope v. Garrett,* 147 Tex. 18, 211 S.W.2d 559 (1948); *Fitz-Gerald v. Hull,* 150 Tex. 39, 237 S.W.2d 256, 260-62 (1951); *Gaines v. Hamman,* 163 Tex. 618, 358 S.W.2d 557, 560 (1962) (quoting *MacDonald v. Follett, supra); Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426, 432 (Tex.Civ.App. 1978), *aff'd after remand,* 611 S.W.2d 917 (Tex.Civ.App.1981). *And see also Gertner v. Hospital Affiliates International, Inc.,* 602 F.2d 685, 687 (5th Cir.1979). And consistent with this view of the broad, flexible posture of equity in imposing the constructive trust remedy, the Texas Supreme Court in *Fitz-Gerald v. Hull, supra,* long ago adopted the definition of constructive trust contained in the Restatement of Restitution sec. 160, as follows:

> Where a person holding title to property is subject to an equitable duty to convey it to another *on the ground that he would be unjustly enriched if he were permitted to retain it,* a constructive trust arises. [Emphasis added.]

Moreover, it is also a firmly established principle of the Texas law of constructive trusts, which neither the majority nor the appellants dispute, that the "fiduciary" or "confidential" relation-

ship necessary to give rise to "an equitable duty to convey" is a correspondingly flexible concept not subject to or governed by any set of technical prerequisites such as those necessary for a finding of partnership or joint venture. *See, e.g., Gaines v. Hamman, supra,* 358 S.W.2d at 560-61; *Cartwright v. Minton,* 318 S.W.2d 449, 453 (Tex.Civ.App.1958); *Omohundro v. Matthews,* 161 Tex. 367, 341 S.W.2d 401, 407-09 [1960]; *Smith v. Bolin,* 153 Tex. 486, 271 S.W.2d 93, 97 (1954); *Fitz-Gerald v. Hull, supra,* 237 S.W.2d at 261.

Although there may be a question of fact, *Smith v. Bolin, supra,* 271 S.W.2d at 97, whether the circumstances of a particular case warrant the finding that justifiable trust and confidence were reposed in the one against whom a constructive trust is sought to be decreed, *see Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex.1962), I find nothing in the Texas cases to limit or qualify the Texas Court of Appeals' observation in *Cartwright v. Minton, supra,* that

> "The term 'fiduciary' is derived from the civil law. It is impossible to give a definition to the term that is comprehensive enough to cover all cases. Generally, speaking, it applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith rather than legal obligation,... The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."

318 S.W. at 453. It bears emphasis that there is no challenge to the District Court's factual finding, which is accepted by the majority, that there was a fiduciary relationship between Ward and Whatley antedating their decision to acquire the Dyckman property.

Despite the foregoing, and without citation to any supporting Texas authority, the majority concludes that Texas case law imposes two absolute prerequisites to the imposition of a constructive trust: (1) a long-standing fiduciary or confidential trusting relationship unrelated to the subject transaction *and* (2) that unjust enrichment would result if a constructive trust was not imposed. Majority Opinion at 13.

With all due respect, the majority's restatement of the Texas law in such absolute terms is not reflected in any Texas decision and has the unfortunate defect of obscuring the one certain principle of the Texas law of constructive trusts, which is repeatedly emphasized in the decisions cited above, that the cases are to be dealt with on their individual facts, applying principles of equity and fairness.

I have searched in vain for a single Texas decision that applies the two-prong test for constructive trust that the majority announces today. It is certainly true that, since the decision in *Consolidated Gas and Equipment Co. v. Thompson, supra,* many Texas courts have concluded that, absent a so-called "formal" fiduciary relationship, like that between attorney and client, a finding of constructive trust depends on the existence of a confidential or fiduciary relationship separate and apart from the transaction in issue. *See, e.g., Panama-Williams, Inc. v. Lipsey, supra,* 576 S.W.2d at 433. Accordingly, some cases deny the constructive trust remedy either on the basis of a finding that there was no relationship between the parties prior to the subject transaction, *see Tyra v. Woodson,* 495 S.W.2d 211 (Tex.1973); *Karnei v. Davis,* 409 S.W.2d 439 (Tex.Civ.App.1966); *Hawkins v. Haffa,* 469 S.W.2d 733, 739—40 (Tex.Civ.App.1971); *Linder v. Citizens State Bank of Malakoff, Texas,* 528 S.W.2d 90, 94 (Tex.Civ.App.1975); *Thomson v. Norton,* 604 S.W.2d 473, 476 (Tex.Civ.App.1980), or on the basis that, while the parties did have a prior relationship, it was not fiduciary or confidential in character, *see Gasperson v. Christie, Mitchell & Mitchell, Co.,* 418 S.W.2d 345, 356 (Tex.Civ.App.1967); *Patton v. Callaway,* 522 S.W.2d 252 (Tex.Civ.App.1975); *Marut v. Collier,* 583 S.W.2d 682, 684—85 (Tex.Civ.App.1979).

However, I do not find an absolute requirement in any of these cases that the prior relationship have been of many years' or "long" standing. And since the unchallenged finding of the District Court here is that there was a fiduciary relationship between Ward and Whatley prior to and independent of their decision to have Whatley take record title to the Dyckman property, none of these cases supports the majority's result.

Further, there is express authority in the Texas cases that the two prongs isolated by the majority are not the sole factors

governing the imposition of a constructive trust. The majority's rule does not, for example, adequately deal with *Meadows v. Bierschwale, supra,* decided by the Texas Supreme Court in 1974, which holds that the constructive trust remedy may be applied in a suit for rescission of a land conveyance even in the absence of any prior relationship between the parties where there is evidence and a finding of actual fraud in the transaction. 516 S.W.2d at 128-29. *See also Maykus v. First City Realty and Financial Corp.*, 518 S.W.2d 887, 896 (Tex.Civ.App.1974) (letter of intent provides documentary proof of the confidential relationship of a present joint venture and, for purposes of constructive trust remedy, is "equivalent" to proof of a preexisting, separate confidential relationship).

Finally, the majority's two-pronged rule implicitly assumes that certain of the older Texas Supreme Court cases, in which the constructive trust remedy was imposed without a finding of any "long-standing fiduciary or confidential, trusting relationship unrelated to the subject transaction," *see, e.g., MacDonald v. Follett, supra; Edwards v. Strong,* 147 Tex. 155, 213 S.W.2d 979 (1948); *Fitz-Gerald v. Hull, supra,* are of no continuing validity after *Consolidated Gas & Equipment Co. v. Thompson, supra.* There is no explicit Texas authority of which I am aware to support this assumption and, indeed, there is post-*Consolidated Gas* authority affirming the continued validity of the leading cases. *See, e.g., Tuck v. Miller,* 483 S.W.2d 898, 905—06 (Tex.Civ.App.1972).

The *Consolidated Gas* decision itself, the decision upon which the majority and the appellees primarily rely, contains no reference whatsoever to "unjust enrichment," the second prong of the majority's two part test[3]. Moreover, *Consolidated Gas* does not signal a radical narrowing of the availability of the constructive trust remedy in Texas. Since that decision, the Supreme Court

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[3]It is perhaps ironic, in light of the frequent statement in the Texas cases that prevention of unjust enrichment is the purpose of the constructive trust remedy, *see, e.g., Fitz-Gerald v. Hull, supra,* 237 S.W.2d at 261, that there is even an indication in at least one Texas case that prevention of unjust enrichment may, in fact, not be a prerequisite to the remedy. *See Holland v. Lesesne,* 350 S.W.2d 859, 862 - 63 (Tex.Civ.App.1961).

of Texas, *Meadows v. Bierschwale, supra,* 516 S.W.2d at 131, and this court, *Gertner v. Hospital Affiliates International, Inc.*, 602 F.2d at 687, have expressly reaffirmed that whether the constructive trust remedy is to be imposed depends on the particular facts before the court.

In *Consolidated Gas,* the Texas Supreme Court found that "the proof in this case," 405 S.W.2d at 337, failed to establish a constructive trust but showed at most either an oral contract to convey an interest in realty or an oral trust, neither of which was enforceable under the Texas Statute of Frauds or the Texas Trust Act. The facts in the case were that C.A. and D.A. Griffith (father and son—the Griffiths) orally agreed with L.B. Newman (Newman), president of Consolidated Gas & Equipment Company of America (Consolidated) to assist him in securing oil and gas leases on properties, particularly those located adjacent to producing properties.

When Newman indicated he wanted a lease on a particular property, D.A. Griffith (D.A.) found that he could not get it fast enough and enlisted the assistance of Thompson, who then worked for Consolidated. D.A. agreed to give Thompson a one-third interest in the Griffith's one-sixteenth royalty if he could obtain the lease. That agreement (between the Griffiths and Thompson) was reflected in a written document which included a reference to a "promissory agreement" on the part of Newman to give the Griffiths and Thompson a one-sixteenth override under the lease. Thompson secured the lease in the name of Consolidated.

The Texas Supreme Court found that the Statute of Frauds and the Texas Trust Act made the alleged oral agreement between the Griffiths and Newman unenforceable. In so holding, it opined, 405 S.W.2d at 336,

> The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship.

It went on to say, "...the fact that one businessman trusts another, and relies upon his promise to carry out a contract does not create a constructive trust." Rather, "...there must be a fiduciary relationship before, and apart from, the agreement made the basis of the suit." Finally, it offered the general observation

that a fiduciary relationship between businessmen who were not joint venturers could arise "where, over a long period of time, the parties had worked together for the joint acquisition and development of property previous to the particular agreement sought to be enforced." Since it found no such relationship, the Court held that no constructive trust had been established in the particular case.

The factual and equitable differences between *Consolidated Gas* and the instant case are obvious. In the former, the Griffiths invested no money in acquiring the leases. Here, Ward furnished all the money to acquire the Dyckman property. The alleged agreement between the Griffiths and Newman related to a single lease. The dealings between Ward and Whatley related to a number of transactions, including the 490 acres owned by the Water Board, the LaRue (Athens) property, the Dyckman property and the Lacys' reversionary claim lawsuit.

With respect to each of these, Ward furnished all the cash until such time as he abandoned his interest in acquiring the 490 acres. He paid the $20,800 note, the proceeds of which Whatley used to acquire the LaRue (Athens) property. He paid the $5,000 down payment plus some $600 in Hart's travel expenses to acquire the Dyckman tract and ultimately purchased the $25,500 note which Home gave Dyckman for the balance of the purchase price. He paid all expenses in connection with the Lacys' lawsuit.

In Consolidated Gas, one of the parties Newman, was dead and the only testimony as to the oral understanding came from those seeking to establish the constructive trust. In *Consolidated Gas,* the Griffiths and Thompson sought some $16,000 in royalties under the one-sixteenth overriding royalty, a royalty based on Thompson's securing a lease at a time when he was employed by Consolidated, probably a breach of his duty to his employer. Here, Whatley seeks $250,000 for which he made no investment and for an interest to which he did not claim any entitlement until April 1972, almost two years after the acquisition of the property and one year after he had billed Ward seeking reimbursement of the money he had spent in the Dyckman transaction, an obvious acknowledgment that Ward was the beneficial owner of the property. In *Consolidated Gas,* the Court found evidence only

of a unilateral subjective trust on the part of the Griffiths, no mutual or reciprocal trust on the part of Newman.

Even assuming, which it does not, that *Consolidated Gas* imposes an absolute and inflexible requirement of a "prior and separate fiduciary relationship" and states, as an unyielding rule, that isolated business transactions fall outside the scope of the constructive trust doctrine, *see Tyra v. Woodson*, 495 S.W.2d 211 (Tex.1973), it does not follow, on this record, that Whatley should or must be awarded this undeserved windfall for his breach of trust. But neither *Consolidated Gas* nor any other Texas authority that I have found requires or even directly supports the majority's holding that "[t]he business dealings between Ward & Whatley ... were not of sufficient duration or intensity to justify the imposition of a constructive trust." Majority Opinion at 949. Indeed, review of the cases cited above—consistent with the flexible principles of equity—yields no such absolute rule and very little discussion of what "duration" in months or years or level of "intensity" of prior dealings is necessary to sustain a constructive trust.

Here, while the relationship between Ward and Whatley was not one of many years' standing, it did involve a number of distinct transactions in each of which there apparently was mutual trust and confidence. Whatley trusted Ward to pay the $20,800 Home loan from State National used by Whatley to purchase the LaRue (Athens) property and Ward paid it. Ward trusted Whatley to negotiate and obtain an assignment of the Lacys' possible claim against the Water Board which Whatley did on the understanding that Ward would pay all expenses in connection with the suit, which he did. Until such time as Ward lost interest in the 490 acre tract, Whatley submitted bids admittedly on Ward's behalf. Hart, on behalf of Ward, negotiated the acquisition of the Dyckman tract with funds provided by Ward who also paid his expenses although title was vested in Home, a Whatley company, which also executed the note and trust deed for the balance of the purchase price, a note ultimately paid by Ward.

Exactly how long the relationship between Whatley and Ward existed is not entirely clear. The original conversations took place in January, February or March of 1970. The LaRue (Athens) pro-

perty was acquired on April 2, 1970 with the proceeds of the $20,800 loan. It was a six-months note and Ward had it renewed on October 1, 1970. The record does not indicate when he paid it off but it apparently was some time in 1971. As a result of meetings in July 1970, the Dyckman property was acquired on July 24 and the assignment of the Lacys' rights to sue the Water Board in August of 1970. Bids on behalf of Ward were made by Whatley as late as July 6, 1970 and Ward and Moore attempted unsuccessfully in June of 1971 to negotiate a settlement of the Lacys' lawsuit as part of Ward's acquisition of the 490 acres. On April 21, 1971, Whatley sent Ward his bill for expenses he had incurred in connection with both the LaRue and Dyckman properties. Not until April 1972, a year later, did Whatley inform Ward that he was denying that Ward had any interest in the Dyckman property.

Depending on what facts are deemed determinative of the termination of the relationship, it would appear that it lasted at least some eighteen months until mid-1971, since Whatley was billing Ward for expenses in April of that year, Ward was still endeavoring to secure the 490 acres in June of that year and Whatley did not submit a bid for the 490 acres on his own behalf until October 1971. If one takes the date on which Whatley first told Ward he did not recognize any interest of the latter in the Dyckman property as the termination date, the relationship existed until April 1972, more than two years after its inception in early 1970.

Whatley has not challenged the District Court's Findings of Fact and there is substantial evidence to support them. They are certainly not clearly erroneous. Accordingly, we are bound to accept them. *See Bryan v. Kershaw, supra,* 366 F.2d at 499; *Williamson v. Brown, supra,* 646 F.2d at 200.

Based on those findings and applying Texas constructive trust law which involves a case-by-case analysis of all the facts and circumstances of the relationship between the parties, the trial judge found that a fiduciary relationship existed between Whatley and Ward and that a constructive trust existed with respect to the Dyckman property of which trust Ward was the beneficiary. Unless we conclude that Texas law absolutely requires a longer and more comprehensive relationship than the relationship in-

dicated by the numerous activities in which Ward and Whatley engaged over a period of eighteen to twenty-seven months, the District Court's conclusions of law are clearly correct under Texas trust law. Whatley and Ward certainly reposed mutual confidence and trust in each other with respect to a number of interrelated but distinct transactions, which confidence and trust, it should be noted, were respected and not violated in any instance by all involved except Whatley. I find nothing in the Texas cases which would compel the conclusion that Judge Hill erroneously found a constructive trust. *Cf. e.g., Sanchez v. Matthews,* 636 S.W.2d 455, 458-59 (Tex.Civ.App.1980).

Judge Hill also found that Whatley and his company, Sentry, would be unjustly enriched if they were permitted to retain the proceeds from the sale of the Dyckman property and that it would be inequitable for them to do so. Given all the facts, this is an obviously correct conclusion. With little or no investment, they would receive over $250,000. In *Fitz-Gerald, supra,* one of the leading Texas cases on constructive trusts, the Texas Supreme Court adopted the Restatement definition that a constructive trust arises when "a person holding title to property ... would be unjustly enriched if he were permitted to retain it,..." *see also Panama-Williams, Inc. v. Lipsey, supra,* 576 S.W.2d at 433.

The majority, however, inexplicably concludes that Whatley will not be unjustly enriched because Ward did not have "clean hands" in his dealings with the Water Board. Whether or not that is true, it is irrelevant. As previously pointed out, Ward faithfully carried out every commitment he made to Whatley. He paid off the $20,800 loan from State National, the proceeds of which Home used to purchase the LaRue (Athens) property. He paid all costs and expenses with respect to the Lacys' claim. He paid the purchase price for the Dyckman property, the $5,000 down payment and later purchased the $25,500 note. He even paid Hart $600 in expenses to go to Canada to negotiate the purchase of the Dyckman property.

Thus, whatever the cleanliness of Ward's hands with respect to the Water Board, it is perfectly clear that, with respect to Whatley, they were "clean." And it has long been understood both elsewhere, *see, e.g., Republic Molding Corp. v. B.W. Photo Utilities,* 319 F.2d 347,349 (9th Cir.1963), and in Texas, *see*

Omohundro v. Matthews, supra, 341 S.W.2d at 410, that the clean hands defense is only available where the plaintiff's hands have become dirtied vis-a-vis the one against whom he asserts his equitable claim. The only party with "dirty hands" here is Whatley. As the trial judge found, and the majority does not dispute, he breached his fiduciary duty to Ward. The majority is applying the "clean hands" doctrine to the wrong party.

The majority also suggests that, while they recognize Whatley clearly will be greatly enriched, he will not be unjustly enriched since Whatley's companies made the mortgage payments and managed the Dyckman property until struck by insolvency. This is ironical to say the least. Whatley billed Ward in 1971 for his expenditures on both the Dyckman and LaRue (Athens) properties and then, after changing his position and asserting beneficial ownership of the Dyckman property in 1972, refused to accept payment. It seems obvious that at the time he made the expenditures, he did so on the assumption he was making them for Ward's benefit and would be reimbursed. Any amount he is now out-of-pocket is the result of his rejection of Ward's check.

The total bill for both properties was $18,672.50. The record indicates that no more than $4,892.50 could have related to the Dyckman property surveying and interest expenses. Two hundred fifty thousand dollars is certainly unjust enrichment to a man who invested little or nothing, claimed reimbursement for what little he may have invested and then breached his fiduciary duty by belatedly claiming a beneficial interest in the property and double-crossing the man who provided all the funds in their dealings.

As an overall matter, Whatley has already received $20,800, the proceeds of the State National loan which Ward paid. The majority proposes to award him an additional sum, of more than $250,000, for a total of more than $270,000. For admittedly faithless conduct, this is rich reward.

To reverse the trial judge to achieve such a result is to me totally inexplicable. Rather than straining to find Texas law, or worse, to enunciate new Texas law, to reverse a just and equitable decision, I would assume an appellate court would seek to affirm such a decision based on undisputed findings of fact and legal

conclusions consistent therewith. Judge Hill's decision is sound in law and in equity and deserves to be affirmed.

As previously noted, resulting as well as constructive trusts are an exception to the Texas Trust Act's inhibition against oral real estate trusts. While I think the facts here clearly warrant the District Judge's finding of a constructive trust, those findings also, in my opinion, clearly establish a resulting trust. As the majority recognizes, a resulting trust arises when one party buys real property with the funds of another with the understanding that the property is being held for the party that provided the money. The majority asserts that the resulting trust analysis does not apply in this case because the evidence fails to demonstrate an intent to establish a fiduciary relationship.

The District Court found, however, that such a fiduciary relationship had been established, that Whatley or his companies had purchased and held the Dyckman property with Ward's money and for his benefit and that Whatley's refusal to convey the property to Ward was a breach of that fiduciary duty. Those uncontested findings, it seems obvious to me, establish a resulting trust. *See, e.g., ATkins v. Carson,* 467 S.W.2d 495, 500 (Tex.Civ.App.1971); *Grasty v. Wood,* 230 S.W.2d 568 (Tex.Civ.App.1950); *cf. Carson v. White,* 456 S.W.2d 212 (Tex.Civ.App.1970) (no resulting trust absent evidence of the source of the funds used to purchase the property).

The fact that Ward has not urged the resulting trust analysis or that the District Court found a constructive trust rather than a resulting trust or both does not change the facts or warrant the majority's dogged refusal to acknowledge that Texas law would impose a resulting trust on the basis of those unchallenged facts. All concerned understood that Whatley was acting in connection with the Dyckman property on behalf of Ward until 1972 when Whatley for the first time sought to deny it. Unless this Court rejects the District Court's uncontested findings, which it is my understanding an appellate court may not do, all the elements of a resulting trust are here present.

Two other matters concern me. First, while I agree with the

District Court's finding that Ward is entitled to the interpleaded funds, if equity is to be accomplished, Whatley or his companies, notwithstanding their refusal to accept Ward's check in payment thereof, are entitled to be reimbursed for any out-of-pocket expenses which they incurred with respect to the Dyckman property. Accordingly, I would remand to the trial court with instructions to enter a judgment consistent with this opinion.

Second, the record indicates that Ward purchased the $25,500 note secured by the vendor's lien and trust deed from Dyckman in 1973 prior to the foreclosure for some $38,000. The record does not indicate that he recovered that amount. This may be because, in light of the District Judge's decision, the question was moot. If Whatley is to receive the proceeds of the foreclosure sale, however, certainly Ward, as the holder of the trust deed, is entitled to recover with interest the amount he paid Dyckman. It may be that Ward has previously recovered that amount, although Whatley's trial brief indicates that Ward has not. If not, he should certainly do so now although the majority does not deal with the question.

III. CONCLUSION

Given the uncontested facts found by the District Court, my reading of Texas trust law and my understanding of the role of a federal appellate court, I would affirm, remanding only to permit appellees to be reimbursed for any out-of-pocket expenses they incurred with respect to the Dyckman property. I cannot in good conscience join in a decision which will reward perfidy and breach of trust with more than $270,000, an amount which, even in Texas, must be substantial.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1108

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY TITLE COMPANY, INC., Et Al.,
DEFENDANTS-APPELLANTS,

versus

TRAVIS WARD,
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(March 12, 1984)

ON MOTIONS FOR RECALL OF MANDATE

Before, WILLIAMS and JOLLY, Circuit Judges,
and WILL*, District Judge.

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*Hon. Hubert L. Will, Senior District Judge
of the Northern District of Illinois,
sitting by designation.

PER CURIAM:

In this case we reversed and rendered the decision of the district court impressing a constructive trust in favor of appellee, Travis Ward, on the proceeds from the sale of property owned by Sentry Title. 715 F.2d 941 (5th Cir. 1983). Suggestion for rehearing en banc and motion for panel rehearing by appellee, Ward, were denied on October 26, 1983. On November 16, 1983, we entered an Order denying appellee's motion for stay of mandate.

We now have before us appellee's motion for recall of mandate under Fifth Circuit Local Rule 41.2, which provides: "A mandate once issued shall not be recalled except to prevent injustice." Two grounds are claimed. The first and important ground is the assertion that our decision in refusing to impress a constructive trust in favor of Ward against Sentry Title on the proceeds from the sale of the land involved was erroneous. This ground constitutes the same attack upon our decision that was made in the motion for panel rehearing and the suggestion for rehearing en banc. In addition, appellee moves for recall of the mandate on the ground that Ward had contributed certain specific sums of money to the purchase of the property at issue and any judgment should provide that Ward was entitled to reimbursement for those sums out of the judgment rendered in favor of Sentry Title.

Sentry Title files a motion to recall the mandate claiming the right to interest on the proceeds from the sale of the property, which were paid to Ward from the registry of the district court following the judgment of the district court, which sums Sentry Title is now entitled to under the judgment of this Court.

The facts of this case are fully reported in our opinion cited above. We do not repeat them here. On the fundamental issue raised by appellee asserting that we were in error in refusing to impress a constructive trust on the proceeds of the sale of the tract at issue, the Dyckman property, we follow our prior decision and deny the motion to recall the mandate. Appellee argues, as do amici curai the Texas Independent Producers and Royalty Owners Association and the Greater Dallas Board of Realtors, that we misapplied Texas law by requiring a prior relationship of trust and confidence between the parties of "long duration" before a constructive trust could be recognized. In this case

whatever was the relationship between Ward and Whatley, the parties involved, it was not of long duration.

The emphasis upon long duration of the prior relationship of trust and confidence between the parties comes from the wording of various Texas decisions. It is not at all a controlling factor, but it is only one factor to be considered. We clearly recognized this in our original decision. A careful reading of our opinion reveals that we did not rely upon a requirement of long duration of prior relationship of trust and confidence. To the contrary at the beginning of our discussion of the issue and at the end of our discussion of the issue, we did not refer to long duration of the relationship at all. At the beginning of our discussion, 715 F.2d at 946, we stated, "In recognizing a constructive trust, the critical requirement for purposes of this case is that the parties have a confidential or fiduciary relationship prior to and apart from the transaction in question." There is no mention of length of such a relationship. Then at the end of our opinion where we state our holding, in the section entitled "Conclusion", we say: "We find that the district court erred in finding a pre-existing confidential relationship between Ward, Whatley, and Hart prior to and separate from the Dyckman tract transactions." *Id.* at 950. In that final conclusory section there is no reference whatsoever to a requirement of "long duration".

We recognize that the Texas law, in the absence of fraud, places almost controlling emphasis upon the requirement that there must be a *pre-existing* confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case. As the facts clearly reveal, the relationship of trust and confidence between Ward and Whatley began with the dealings relating to Whatley serving as Ward's "front" to bid on the 490 acre tract owned by Tarrant County. Both of the other real estate dealings in question are directly tied into that fundamental transaction. They are not separate and independent dealings. The first of these is the agreement under which Ward aided Whatley in taking up an option to buy some land in Athens, Texas. It is clear from the record that this agreement by Ward was a quid pro quo for Whatley bidding for Ward on the Tarrant County land.

The land deal which is at issue in this case, the Dyckman tract deal, was directly related to the undertaking to purchase the Tarrant County tract. It was understood between the parties that if Ward could obtain the Dyckman land, again using Whatley as a "front", it might help Ward in his dispute with Tarrant County concerning the bidding on the 490 acre tract. One could hardly imagine a more close knit relationship between the Dyckman tract deal and the original Tarrant County bidding. The Tarrant County land deal cannot serve to establish a pre-existing relationship for the Dyckman land deal. It follows there was no pre-existing relationship of trust and confidence between Ward and Whatley before their dealings began to obtain the 490 acre tract from Tarrant County by way of bid. Then, both the Athens land deal and the Dyckman tract deal were inextricably interwoven with that fundamental business relationship, the only business relationship between the parties.

Since the agreement on the Dyckman tract was oral, and since it was not based upon a pre-existing confidential relationship involving separate and independent relations between the parties, the Statute of Frauds, applied with full force to that deal, and no constructive trust could be created. As we stated in our original opinion, this is the very kind of situation the Statute of Frauds was meant to control. There is a noticeable lack of discussion of the Statute of Frauds and its purpose in the briefs of appelless on this issue. We recognize that each case under Texas law turns upon its own facts. The facts were established and found by the district court, but under those facts the requisites to the establishment of the constructive trust in Texas law were not met.

Appellee Ward's motion for recall of the mandate on the ground that Ward is entitled to certain funds advanced to Whatley for the purchase of the Dyckman tract is GRANTED. The Court felt that it was clear from its opinion that those sums could be retained by Ward when the other sums which Ward had received from the registry of the court after the district court's judgment were turned over to Whatley in accordance with our mandate. In view of the claims now made by Ward, we cannot tell precisely from the record the amount of money involved to which Ward is entitled. We therefore modify the mandate to remand rather than render so that the district court can determine that

sum with precision on the basis of its findings. This conclusion is also related to the modification of our mandate to reverse and remand contained in the next paragraph.

We GRANT the motion of appellant Sentry Title to recall the mandate. We reverse and remand to allow the district court to determine what interest if any is payable to Sentry Title in its recovery from Ward of the sums to which it is entitled under our decision after the amount in the registry of the district court was paid to Ward pursuant to the judgment of the court.

In summary: we recall our mandate in this case. The judgment of the district court is REVERSED and REMANDED to the district court for further proceedings and entry of judgment in accordance with this opinion. Our original decision in this case, 715 F.2d 941 (5th Cir. 1983), stands unchanged except as follows: The case is returned to the district court solely for the court to determine (1) the amount of money which appellee Ward is entitled to deduct as his actual out-of-pocket expenditures, plus interest in the discretion of the district court, in connection with the Dyckman tract purchases as he complies with the mandate of the Court to pay over to Sentry Title the proceeds from the sale of the Dyckman tract, and for the court to determine (2) the interest which should be paid to Sentry Title by Ward on the sum to which Sentry Title is entitled under our mandate as proceeds from the Dyckman tract after deduction of Ward's actual costs advanced in the purchase and maintenance of title in the Dyckman tract and commencing on the date the funds plus accrued interest were paid from the registry of the court to appellee Ward.

REVERSED AND REMANDED.

Harris v. Sentry Title Co., Inc.

No. 82-1108 (5th Cir.)

WILL, District Judge, dissenting:

In its September 26, 1983 opinion in this matter, the majority of this panel accepted the unchallenged finding of the District Court below that the business dealings between Travis Ward and Alan Whatley began months before those two had any discussion about acquiring the so-called Dyckman property, the subject-matter of this lawsuit. 715 F.2d at 948. The majority necessarily

also accepted the District Court's additional, unchallenged finding of fact, *see Smith v. Bolin*, 153 Tex. 486, 271 S.W.2d 93, 97 (1954), that those earlier business dealings created a fiduciary relationship between Ward and Whatley. 715 F.2d at 949.

The majority held, however, that the prior fiduciary relationship between Ward and Whatley was not of sufficient long standing to justify the imposition of a constructive trust:

> *To show a constructive trust, a plaintiff must first show*, by a preponderance of the evidence, . . . that the parties had a *long-standing* fiduciary or confidential trusting relationship unrelated to the subject transaction. . . whether or not a fiduciary relationship exists is a question of *fact*, . . . but whether a relationship is sufficiently *longstanding* to support imposition of a constructive trust is a question of law. . . We find as a matter of law that the dealings between Ward and Whatley in this case were not sufficiently *longstanding* to support the district court's application of a constructive trust. [Emphasis added.]

715 F.2d at 948.

And again, the majority said:

> Even if one were to count the additional time during which Whatley's companies held the tract, it would be difficult on the facts of this case to find a *longlasting* independent relationship between Ward and Whatley or his companies." [Emphasis added.]

Ibid. at 949.

Finally the majority re-emphasized its position later in its opinion:

> The business dealings between Ward and Whatley, whatever their nature, were not of *sufficient duration* or intensity to justify the imposition of a constructive trust. *The first of the two requirements to establish a constructive trust was not met.* [Emphasis added.]

Ibid. at 949.

I would not have dissented on September 26, 1983 had it not been the case (1) that Ward and Whatley, as a matter of undisputed fact, had a fiduciary relationship prior to their decision

to acquire the Dyckman property and (2) that, considering this fact, Texas law would permit the imposition of a constructive trust without, as the majority's original opinion clearly held, an absolute first requirement that the prior relationship have been "long-standing," "long-lasting," or of "sufficient duration."

The majority appears now to concede that its earlier view of the Texas law was incorrect:

> A careful reading of our opinion reveals that we did not rely upon a requirement of long duration of prior relationship of trust and confidence. To the contrary at the beginning of our discussion of the issue and at the end of our discussion of the issue, we did not refer to the long duration of the relationship at all.

Per Curiam Opinion of_____at 3. With all due respect, the majority opinion stated categorically as quoted above that a "long-standing" or "long-lasting" fiduciary relationship is, under Texas law, the *first* requirement of a constructive trust.

Moreover, the headnotes for the original published opinion, 715 F.2d 941, indicate that the majority so held.

Headnote No. 1 reads:

> **1. Trusts 91**
>
> "Constructive trust" is equitable remedy that can infer fiduciary-like relationship within transaction for purpose of promoting justice and that can be imposed on parties whose course of conduct over *long, pre-existing period* suggests that relationship of confidence and trust was assumed by parties to subject action. [Emphasis added.]

Headnote No. 17 reads:

> **17. Trusts 110**
>
> To show constructive trust under Texas law, plaintiff must *first* show, by preponderance of evidence, that parties had *longstanding* fiduciary or confidential, trusting relationship unrelated to subject transaction. [Emphasis added.]

Headnote No. 18 reads:

> **18. Trusts 103**
>
> Under Texas law, whether or not fiduciary relationship exists is question of fact, but whether relationship is sufficiently *longstanding* to support imposition of constructive trust is question of law. [Emphasis added.]

Now, however, the majority finds, contrary to the undisputed fact, that there was no prior fiduciary or confidential relationship between these parties:

> We recognize that the Texas law, in the absence of fraud, places almost controlling emphasis upon the requirement that there must be a *pre-existing* confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case.

Per Curiam Opinion of _____ at 4.

The district court found as a fact which was not disputed on appeal that a confidential or fiduciary relationship existed between Ward and Whatley prior to and apart from their Dyckman property dealings. On what basis the majority now can reverse that undisputed fact finding, I do not understand.

The majority also suggests that, because the Dyckman acquisition was "directly related" to the parties' prior dealings and was "not separate and independent" from those prior dealings, somehow, the pre-existing fiduciary relationship will not, under Texas law, support a constructive trust. *Ibid.* I can find no Texas case so holding. In addition, this ignores the critical, undisputed fact that Ward and Whatley did not discuss or contemplate acquiring Dyckman until months after their fiduciary relationship had been established. Moreover, the majority's current insistence that, in order to impose a constructive trust, the prior dealings must have been *"separate"* from the subject transaction is ironic in light of the requirement of Texas law that a constructive trust may *only* be imposed where the subject transaction is *within* the scope of the parties' prior dealings. *Rankin v. Naftalis,* 557 S.W.2d 940, 944 (Tex. 1977).

I am in agreement with the partial grant of appellee Ward's motion to recall the mandate since it reflects recognition of another of the errors in the original opinion to which I referred in my dissent. But the basic error of the majority holding remains uncorrected. A man who admittedly breached his fiduciary duty is still to be rewarded by receiving what now appears to be in excess of $400,000 when neither the uncontested facts nor the Texas law justify, much less require, such an unjust and inequitable result.

Having apparently abandoned its earlier effort to rewrite the Texas law, the majority now seeks to rewrite the undisputed facts of this case. For the reasons stated in my original dissenting opinion and herein, I deplore both efforts and, accordingly, again dissent.

APPENDIX C

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-75-0680-D

LARRY D. HARRIS, PLAINTIFF

versus

SENTRY DEVELOPMENT CORPORATION, ET AL,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for hearing and trial, the Court, after having heard the evidence, considered the parties briefs and the arguments of counsel, makes the following findings of fact and conclusions of law.

Findings of Fact

1. By way of this interpleader action Larry D. Harris (Harris), plaintiff, seeks to have this court determine the ownership of $250,000 which are the proceeds from the sale at foreclosure of a 9 acre tract of land known as "the Dyckman property." This tract of land had been purchased from Stewart R. Dyckman (Dyckman) in the name of Home Engineering, Inc. (Home), defendant, which had given a Deed of Trust on the tract of land to secure a promissory note in favor of Dyckman (the Dyckman Note) with which Home purchased the Dyckman property. The Dyckman Note was sold to Bob John Robinson (Robinson). Home then defaulted on the Dyckman Note. A foreclosure sale was held under the Deed of Trust and the Dyckman property was sold to Travis Ward (Ward), defendant for $250,000. This action was then initiated by Harris, trust under the Deed of Trust, and the $250,000 (the fund) was placed in the registry of this Court subject to the claims of those asserting ownerships thereto.

2. Harris sought to recover from the fund substitute trustee's fees and attorney's fees he incurred as a result of the foreclosure sale and the filing of this action. Harris' claims were disposed of by Order of this Court filed April 23, 1981.

3. J. Lawson Goggans (Goggans), defendant, was the attorney for Dyckman with respect to Dyckman's efforts to collect the Dyckman Note. Thereafter, Goggans acted as Robinson's attorney in Robinson's effort to collect the Dyckman note. On the date of foreclosure the amount owing on the Dyckman Note was $38,855.51. Goggans claims that the Dyckman provided that ten percent (10%) of the principal and interest due would be payable as attorney's fees if the Dyckman Note was placed in the hands of an attorney for collection. Thus, Goggans seeks recovery of the sum of $3,885.55 from the fund as an attorney's fee. Goggans contends that his claim is prior and superior to that of any other defendant.

4. The claims of the Internal Revenue Service (IRS) have been fully satisfied , and the IRS was dismissed as a party to this action Order of this Court filed May 23, 1979.

5. All parties agree that the holder of the Dyckman Note is entitled to the first payment out of the remainder of the fund.

6. Ward seeks to recover the remainder of the fund on the ground that Home took title to the Dyckman property on his behalf, thereby creating an equitable title to the Dyckman property in Ward. Thus, Ward claims that the proceeds of the sale now represented by the fund belong to him.

7. Texas Engineering Associates (Texas Engineering), defendant claims that it is the holder of a recorded abstract of judgment again. Sentry Title Company, Inc. (Sentry), defendant, filed of record on December 5, 1974, in Henderson County, Texas. The judgment is in the sum of $837.53, plus attorneys' fees of $400, with interest on said amounts at the rate of ten percent (10%) per annum, plus $24 as costs action. Texas Engineering seeks recovery of this judgment out of the proceeds of the fund to which Sentry is entitled.

8. Sentry seeks to recover the remainder of the fund on the ground that it was the record title holder of the Dyckman property at the time it was sold at the foreclosure sale. Prior to the

foreclosure sale Home had deeded the Dyckman property to Sentry, but retained a lien thereon.

9. Home and Alan D. Whatley, defendant, claim the remainder of the fund through Sentry.

10. In early 1970 Ward learned that the Tarrant County Water Board (the Water Board) planned to sell 490 acres of land near Cedar Creek Lake, Henderson County, Texas (the 490 acres).

11. Ward desired to purchase the 490 acres. Whatley and Bill (Hart), Whatley's attorney and agent and also Home's attorney and agent were acquainted with several members of the Water Board and had dealt with the Water Board in the past. Ward sought Whatley's and Hart's help in submitting a bid for the 490 acres.

12. Whatley and Hart agreed to help Ward submit a bid for the 490 acres. In return (Hart) was to receive $30,000 to $35,000 if the 490 acres was acquired by Ward. Whatley was to be compensated by obtaining Ward's aid on another land transaction involving 16 acres in Athens, Texas (the Athens property). Whatley had a contract to purchase the Athens property for approximately $80,000. Ward agreed to provide Whatley $20,800 for the down payment on the Athens property, which the parties agreed was to be owned equally by Whatley and Ward.

13. In March 1970 Ward provided Whatley with $20,800 in the form of a loan from State National Bank of Corsicana, Texas, to be used as down payment on the Athens property. Ward was the majority stockholder and an officer of the bank and arranged for Whatley to obtain this loan. The loan was made in Whatley's name because the bank examiner objected to a bank officer obtaining a loan from the bank. Ward later paid this note out of his personal funds.

14. In April 1970 the Athens property was acquired by Whatley using the $20,800 loan proceeds from the Corsicana bank as a down payment. The Athens property was acquired in the name of Home, which at the time was owned by Whatley. Home later conveyed the Athens property to A.D.W. Enterprises, who then conveyed the property to Computer Land Title, Inc.

15. In early 1970 Whatley, Hart and Ward began to discuss the 490 acres and how to bid for it. For various reasons, including

Ward's fear that the price would go up if his name was used, Ward did not want to bid for or take title to the 490 acres in his name. Therefore, the parties discussed the possibility of using Home as an entity which would bid for and take title to the 490 acres.

16. On July 6, 1970, a bid of $480,000 for the 490 acres was submitted by Hart to the Water Board. This bid was made by Hart on behalf of Ward.

17. On July 6 two more bids were submitted to the Water Board for the 490 acre tract. Ward submitted a bid in the amount of $511,000 in the name of one of his companies, Pan American Properties, Inc. Home submitted a bid of $771,750 in its name on behalf of Ward. These two bids were submitted in order to assure that Ward obtained the 490 acre at the lowest price. If the $771,750 bid was the highest and the $511,000 was the next highest, the parties planned to have Home withdraw the $771,750 bid. On the same date another bid of $1,527 per acre, or $748,230, was submitted by Spanish Shores for the 490 acres.

18. Upon receipt of Spanish Shores' bid the Water Board indicated that it was the highest bid. In an effort to demonstrate to the Water Board that the Home bid of $771,000 was the best offer, Ward requested and received an analysis of Spanish Shores' bid and Home's bid from the Republic National Bank in Dallas, Texas, which was submitted to the Water Board. The Water Board planned to meet to discuss the offers on July 28.

19. Between July 6 and July 28 Whatley, Hart and Ward had two meetings. At these meetings they discussed the purchase of the Dyckman property by Ward. The Dyckman property abutted and possessed an easement over the 490 acres. Whatley and Hart had earlier entered into negotiations with Dyckman to purchase the Dyckman property. The parties decided that Ward's bids before the Water Board to acquire the 490 acres would be greatly enhanced if the Dyckman property was acquired by Ward prior to the July 28 Water Board meeting. Ward gave Hart $600 for his expenses to acquire the Dyckman property from Dyckman. Hart thereafter reached an agreement with Dyckman to purchase the Dyckman property for $30,500.

20. About July 24 Home acquired the Dyckman property on

behalf of Ward by way of a Warranty Deed. The consideration for this sale consisted of a $5,000 down payment furnished by Ward from his personal funds and a promissory note in the principal sum of $25,500 executed by Home secured by a vendor's lien and deed of trust on the Dyckman property. The Dyckman property was later conveyed by Home to Sentry shortly after Sentry was formed in 1972 by Whatley.

21. At about the same time Whatley, Hart and Ward also discussed acquiring the right to prosecute a law suit against the Water Board to recover some land previously owned by Jack and Pauline Lacy (the Lacys) which was a part of the 490 acres but which had been sold by the Lacy's to the Water Board. It was contemplated by the parties that the acquisition of the Lacy lawsuit would enhance Ward's efforts to acquire the 490 acres. The right to prosecute the Lacy lawsuit was acquired from the Lacys by Whatley in August 1970. Willis Moore (Moore), Ward's attorney, assisted in the acquisition of the Lacy lawsuit and Ward paid Moore's attorney's fees for filing and prosecuting the Lacy lawsuit. Later, another attorney was hired and paid for by Ward to assist in the prosecution of the Lacy lawsuit. In June 1971 Moore and Ward attempted to settle the Lacy lawsuit with the Water Board in exchange for Ward's right to acquire the 490 acres.

22. At this same time Ward engaged Hart to obtain for him a reversionary interest that Dyckman owned in a portion of the 490 acres, but Hart was unable to do so.

23. By securing the Dyckman property and accompanying easement on the 490 acres, the Lacy lawsuit and the Dyckman's reversionary interest, Ward hoped to be in a better bargaining position with the Water Board his efforts to acquire the 490 acres and to discourage other bidders for the 490 acres.

24. The above transactions were entered into pursuant to an agreement between Ward and Whatley that Whatley would take and hold title to the property which was the subject of each transaction in Whatley's name or in the name of an entity owned by Whatley for the use and benefit of Ward. By virtue thereof a "fiduciary relationship" was created and existed between Ward and Whatley as to the acquisition of the Dyckman property.

25. At the July 29, 1970, meeting of the Water Board the bids for the 490 acres were rejected and new bidding was scheduled on October 1971.

26. On November 16, 1970, at Ward's request, Whatley conveyed lake lot to M. O. Atterbury, a friend of Ward. The lot was worth between $4750 and $6500. This conveyance was not made in return for the $5000 furnished by Ward as the down payment on the Dyckman property.

27. On April 21, 1971, Whatley billed Ward for expenses he had incurred in connection with their land transactions. These expenses included the clearing of brush from the Athens property, interest on the Athens property, interest on the Dyckman property, and the expense of a survey done on the Dyckman property.

28. On October 15, 1971, two bids were submitted to the Water Board for the 490 acres. Sentry though Whatley, its president, submitted a bid of $750,000. Eastern Resort Properties submitted a bid of $801,150.

29. Another series of bids was taken by the Water Board on February 10, 1972. Sentry made a bid of $807,256, Eastern Resort Properties made a bid of $762,888, and Cedar Creek Enterprises made a bid of $785,000. On the basis of these bids the Water Board sold the 490 acres to Sentry on May 25, 1972. Ward did not bid on the 490 acres and abandoned his efforts to acquire the tract because he was of the opinion that the price being sought by the Water Board was too high.

30. In April 1972 Whatley advised Ward that title to the Dyckman property was not being held by Whatley or an entity controlled by Whatley for the use and benefit of Ward. At the time Whatley and Ward had a physical altercation over the status of their relationship. Prior to this Ward did not know that Whatley and Home were asserting an adverse interest to the Dyckman property. Subsequently, on May 16, 1972, Ward forwarded a check to Whatley for the expenses Whatley had billed him on April 21, 1971, in connection with their land transactions. Whatley rejected Ward's check.

31. In August 1972 Ward filed suit in Henderson County, Texas, against Whatley, Home, and Community Engineering. In this action Ward asserted his claim to the Dyckman proper-

ty. Ward later joined Sentry as a defendant in this action. Sentry defaulted and Ward then nonsuited the other defendants in order to obtain a final judgment against Sentry. He then immediately reasserted his claims against Whatley, Home and Community Engineering in another action filed in Henderson County in September, 1973.

32. On January 22, 1973, Sentry acquired the Dyckman property from Home. Sentry had knowledge of Ward's beneficial interest in the Dyckman property when it acquired the Dyckman property.

33. On November 14, 1974, an involuntary petition in bankruptcy was filed in Dallas, Texas, against Whatley and Home, ADW Enterprises, Community Engineering, Inc., Uticor Corp., H & D Construction Co., Inc., and Computer Land Title Co., Inc. These companies were controlled in whole or part by Whatley.

34. On November 4, 1975, Home filed a voluntary petition under Chapter XI in bankruptcy in Tyler, Texas. In this action Jerry Bain (Bain) was named as Trustee.

35. In February 1976 the Dallas bankruptcy actions were consolidated with the Tyler action, and statements of affairs and schedules were filed on behalf of all of the entities before the bankruptcy court. Sentry was not included in any of these proceedings. Neither the Dyckman property nor the Athens property was listed on any of the bankruptcy schedules. Ward was not sent official notice of these proceedings nor was he listed as a creditor of the entities involved in the bankruptcy proceedings.

36. The order confirming the plan of arrangement and the arrangement in the consolidated bankruptcy actions was signed October 10, 1979.

37. During the pendency of the bankruptcy proceedings, Bain spoke to Moore, Ward's attorney, and he knew that Moore represented Ward. Ward had knowledge of the bankruptcy proceedings, but he did not file a claim in the proceedings. Bain had knowledge of the Ward-Whatley state litigation over the Dyckman property, but he made no effort to intervene in such litigation and assert an ownership interest in the property on behalf of the debtors in bankruptcy.

38. Sentry's Certificate of Authority was forfeited in 1979 by the Texas Secretary of State, and it was reinstated on April 30, 1981.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Ward's claims to impose a constructive trust on the fund are not barred by the Texas Statute of Frauds, Tex. Bus. & Com. Code Ann. tit. 3, §26.01. *See Palmer v. Fuqua,* 641 F.2d 1146, 1159 (5th Cir. 1981); *Ginther v. Taub,* 570 S.W.2d 516, 525 (Tex. Civ. App. - Waco 1978, writ ref'd n.r.e).

3. An action to enforce a "constructive trust" upon property must be brought within four years of the date the cause of action arose. *See Miles v. Martin,* 321 S.W.2d 62, 69 (Tex. 1959); *Field Measurement Service Inc. v. Ives,* 609 S.W.2d 615, 620 (Tex. Civ. App. - Corpus Christi 1980, writ ref. n.r.e.) Ward's cause of action based on a constructive trust theory did not arise until such time as (1) he discovered the fraud on which he bases his claims or (2) he should have through reasonable diligence discovered such fraud. *Id.; Id.* at 619. However, when a confidential relationship exists between parties, the "diligence on the party defrauded does not exact as prompt and as searching an inquiry into the conduct of the other party as where the parties were strangers or were dealing with strangers." *Bush v. Stone,* 500 S.W.2d 885, 890 (Tex. Civ. App. - Corpus Christi 1973, writ ref. n.r.e.). Consequently, since Ward had no reason to know prior to April 1972 that Whatley and Home were asserting an interest in the Dyckman property which was adverse to him. Ward's cause of action arose in April 1972 when he first became aware of Whatley's and Home's adverse claims to the Dyckman property. Ward filed a suit against Home and Whatley within four years of his discovery of the fraud. He also made claims on Sentry for the Dyckman property within the limitations period. Thus, Ward's cause of action asserting ownership to the fund is not barred by the statute of limitations.

4. Ward's claims are not barred by the discharge in bankruptcy of Whatley and Home. A discharge in bankruptcy operates as an injunction against the commencement or continuation of

an action to collect, recovery, or offset a debt of the debtor. *See* 11 U.S.C. §524(a) (2). Such a discharge is personal to the bankrupt and does not release others who may be jointly liable with the debtor. *See Swinford v. Allied Finance Co.*, 424 S.W.2d 298 (Tex. Civ. App., writ dismissed), *cert. denied,* 393 U.S. 923 (1968). In addition, the owner of a beneficial interest in property can recover that interest from one who took the property with knowledge that the property is subject to a trust. *See Richards v. Combest,* 208 S.W.2d 392 (Tex. Civ. App. - Beaumont 1947, writ ref. n.r.e. Consequently, since Sentry was aware of Ward's claim to the Dyckman property Ward can properly assert his claim to the Dyckman property against Sentry; and since Sentry was not a debtor in the bankruptcy proceedings, the discharge in bankruptcy of Whatley, Home and Community Engineering which took place after Sentry acquired title to the Dyckman property does not bar Ward's claim to the fund. This conclusion is supported by the fact that neither Whatley nor Home made any claim to the Dyckman property during their bankruptcy proceedings, that Ward did not, as a creditor of Whatley or Home, receive official notice of the proceedings, and that Bain, as trustee in bankruptcy, knowingly chose not to become involved in the litigation surrounding the Dyckman property.

5. To establish a "constructive trust" as to the Dyckman property his favor Ward must show by preponderance of the evidence, *see Putaturo v. Crook,* 653 F.2d 1027 (5th Cir. 1981), that a confidential or fiduciary relationship existed prior and apart from the agreement upon which relied is sought, that the agreement sued upon was within the scope of the relationship; *see Rankin v. Naftalis,* 557 S.W.2d 940, 944 (Tex. 1977), or that it would be inequitable to allow the title holder to retain the property subject to the agreement, *see Panama-Williams, Inc. v. Lipsey,* 576 S.W.2d 426 (Tex. Civ. App. - Houston (1st Dist.) 1978, writ ref. n.r.e.). The prior relationship, however, need not be based upon a written agreement between the parties; it can arise from a purely personal or informal relationship, where trust and confidence have been reposed by the parties by reason of the relationship. *See Fitz-Gerald v. Hull,* S.W.2d 256, 261 (Tex. 1951); *Thigpen v. Locke,* 363 S.W.2d 247, 253 (Tex. 1962); *Ginther v. Taub, supra* at 525. *See, also, generally Tyra v. Wood-*

son, 495 S.W.2d 211 (Tex. 1973); *Consolidated Gas & Equipment Co. v. Thompson,* 405 S.W.2d 333 (Tex. 1966).

6. Whether the relationship of the parties is a fiduciary relationship upon disputed evidence is a question of fact. *See Schiller v. Elick,* 240 S.W.2d 997, 999 (Tex. 1951).

7. Ward has established that prior to and apart from Whatley, Hart's agreement to acquire the Dyckman property in the name of Home Ward, a fiduciary, confidential relationship existed between Ward, and Hart. This confidential relationship arose when Whatley and Hart agreed to assist Ward obtain the 490 acres, and it extended to the land ventures they joined in. In addition, the agreement to buy the Dyckman property was clearly within the scope of that prior agreement and in furtherance of the prior agreement. Finally, Ward has established to allow Whatley and Sentry any interest in the fund would unjustly enrich Whatley and Sentry.

8. Ward has established that Home and Whatley, individually owner of Home, acted under a fiduciary relationship with him when Hart acquired the Dyckman property; that Home and Whatley, as owner of Home, held title to the Dyckman property in constructive trust for him; that Home's failure to transfer title of the Dyckman property to him and subsequent transfer of title to Sentry was in breach of this fiduciary relationship; and that at the time of foreclosure of the Dyckman Note Sentry held the Dyckman property in trust for him.

9. Ward is entitled to have a constructive trust imposed on the fund and recover the fund after the payment of superior claims thereto.

10. Goggans' claim for attorney's fees in the amount of $3,885 is superior to Ward's claim.

11. Ward's claim is superior to the claims of the other defendant.

12. Harris and Goggans should recover their costs of action out of the fund. Ward should recover his costs of action from Whatley and Home. All other parties should bear their own costs.

13. Counsel for Ward should prepare a judgment in accordance with these findings of fact and conclusions of law and other orders of this Court.

Dated this 25th day of November, 1981.

United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

August 30, 1984

MEMORANDUM TO COUNSEL
OR PARTIES LISTED BELOW:

No. 82-1108 - HARRIS v. SENTRY v. WARD
(D.C. No. CA-3-75-0680-D)

The following action has been taken in the above case:

☐ AN EXTENSION OF TIME has been granted to and including
- ☐ for filing appellant's/petitioner's brief.
- ☐ for filing appellee's/respondent's brief.
- ☐ for filing reply brief.
- ☐ for filing petition for rehearing.
- ☐

☐ Motion to consolidate granted.
☐ Motion to supplement or correct the record granted.
☐ Motion for leave to file supplemental brief granted.
☐ Motion for leave to file brief *amicus curiae* is granted.
☐ Joint motion as to time for filing briefs granted.
✔ Order enclosed has been entered.
☐

GILBERT F. GANUCHEAU, Clerk
By: _____
Deputy Clerk

MOT-2

cc: Mr. J. Albert Kroemer
Mr. David Crump
Mr. Charles O. Shields
Mr. Hiram C. Eastland, Jr.
Mr. James P. Coleman
Mr. Kirk P. Watson
Mr. Michael F. Rohde

P.S. TO MR. EASTLAND:
IN LIGHT OF THE COURT'S ORDER I RETURNED HEREWITH YOUR UNFILED SUGGESTION FOR REHEARING EN BANC.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1108

LARRY D. HARRIS, Plaintiff,

versus

SENTRY TITLE COMPANY, INC., ET AL.,
Defendants-Appellants,

versus

TRAVIS WARD, Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

O R D E R :

IT IS ORDERED that the motion of appellee for leave to file suggestion for rehearing en banc in light of intervening decision of Supreme Court of Texas is **denied**.

UNITED STATES CIRCUIT JUDGE

COMPARISON OF LINE OF TEXAS SUPREME COURT CASES RECOGNIZED BY *GINTER V. TAUB* AND THE FIFTH CIRCUIT IN *PALMER V. FUQUA*, TO *HARRIS V. SENTRY TITLE CO.*, ILLUSTRATING EGREGIOUS, IRRECONCILABLE CONFLICT JUSTIFYING SUPREME COURT REVIEW OR SUPERVISION

Ginter V. Taub, the most recent Texas Supreme Court case reviewing circumstances appropriate for imposition of a constructive trust and the Fifth Circuit Court of Appeals in ***Palmer v. Fuqua***, recognized a line of cases upholding imposition of constructive trusts where the property at issue is directly related to a prior fiduciary relationship.

Huffington v. Upchurch, 532 S.W.2d 576 (Tex. 1976); 523 S.W.2d 44 (Tex. Civ. App. 1975)	***Rankin v. Naftalis*** 557 S.W. 2d 949 (Tex. 1977)	***Palmer v. Fuqua*** 541 F.2d 1144 (5th Cir. 1981)	***Harris v. Sentry Title Co., Inc.*** 715 F.2d 941 (5th Cir. 1983); 727 F.2d 1368 (5th Cir. 1984).
Recognized that property at issue *directly related to a prior fiduciary relationship is sufficient* to impose constructive trust.	Recognized that property at issue *directly related to a prior fiduciary relationship is sufficient* to impose constructive trust.	Recognized that property at issue *directly related to a prior fiduciary relationship is sufficient to impose constructive trust*.	Held that *because* property at issue *directly related to* a *prior fiduciary relationship*, the prior fiduciary relationship *not sufficient to support imposition of constructive trust*. Held that prior fiduciary relationship must be a separate and independent relationship, unrelated to the property at issue.
Pertinent Facts: An action to impose a constructive trust on certain property (the Indonesian venture, the property at issue), which was *acquired pursuant to* an acquisition plan which gave rise to a *fiduciary relationship* between the parties *prior to the acquisition of the property at issue*.	**Pertinent Facts:** An action to impose a constructive trust on certain property, (the Orsak lease, the property at issue). The property at issue was not, however, directly related to or thus acquired within the scope of a prior fiduciary relationship pertaining solely to a prior lease, the Melton lease.	**Pertinent Facts:** An action to impose a constructive trust on certain property (the Ritchie lease, the property at issue), which was *acquired pursuant to* an acquisition plan which gave rise to a *fiduciary relationship* between the parties *prior to the acquisition of the property at issue*.	**Pertinent Facts:** An action to impose a constructive trust on certain property (the Dyckman tract, the property at issue), which was *acquired pursuant to* an acquisition plan which gave rise to a *fiduciary relationship* between the parties *prior to the acquisition of the property at issue*.
The Court found that the prior relationship between the parties regarding the acquisition plan was fiduciary in character. *Id.* at. 579.	The Court found that while the prior relationship between the parties pertaining to a prior lease, (the Melton lease), was fiduciary in character, the fiduciary relationship was limited solely to that particular lease. *Id.* at 944.	The Court found that the prior relationship between the parties regarding the acquisition plan was fiduciary in character. *Id.* at 1155.	The Court found that the prior relationship between the parties regarding the acquisition plan was fiduciary in character. *Id.* at 948.
The Court found that *acquisition of the property at issue* was *directly related*, and thus, within the scope of the *prior fiduciary relationship* which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 578; 523 S.W.2d 44 (Tex. Civ. App. 1975)	The Court found that the property at issue was *not* directly related to, or thus, within the scope of the prior fiduciary relationship which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 944.	The Court found that *acquisition of the property at issue* was *directly related*, and thus, within the scope of the *prior fiduciary relationship* which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 1155, 1157.	The Court found that *acquisition of the property* at issue was *directly related*, and thus, within the scope of the *prior fiduciary relationship* which the parties relied upon as the basis for imposition of a constructive trust. *Id.* at 948; 727 F.2d 1368, 1370.
Issue: Whether the prior fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?	*Issue:* Whether the prior fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?	*Issue:* Whether the prior fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?	*Issue:* Whether the fiduciary relationship found to exist between the parties was sufficient to support imposition of a constructive trust on the property at issue before the Court?
Holding and Rationale: The Court imposed a constructive trust on the basis that the *property at issue* before the Court, the Indonesian venture, was *directly related*, and thus within the scope of the *prior fiduciary relationship*, and that therefore, the prior fiduciary relationship *was sufficient* to support imposition of a constructive trust. *Id.* at 578; 523 S.W.2d 44 (Tex. Civ. App. 1975).	**Holding and Rationale:** The Court did *not* impose a constructive trust on the basis that the property at issue before the Court, the Orsak lease, was *not* directly related, and thus, *not* within the scope of the prior fiduciary relationship, and that therefore, the prior fiduciary relationship was *not* sufficient to support imposition of a constructive trust. *Id.* at 944. *Importantly*, in citing *Huffington*, and consistent with the 5th Circuit in *Palmer, the Court held that had the property at issue been directly related to or thus within the scope of the prior fiduciary relationship, the prior fiduciary relationship would have been sufficient to support imposition of a constructive trust. Id.* at 943-944.	**Holding and Rationale:** The Court imposed a constructive trust on the basis that the *property at issue* before the Court, the Ritchie lease, was *directly related*, and thus within the scope of the *prior fiduciary relationship*, and that therefore, the prior fiduciary relationship *was sufficient* to support imposition of a constructive trust. *Id.* at 1157-1158, 1160. (The 5th Circuit relied upon *Rankin and Huffington, Id.* 1157-1158.)	**Holding and Rationale:** The Court held that the *prior fiduciary relationship* between the parties was *not sufficient* to support imposition of a constructive trust *because the subsequent property transaction at issue* was *directly related*, and thus within the scope of the fiduciary relationship. *Id.* at 948; 727 F.2d 1368, 1370. The Court held that while the Tarrant County land deal (the acquisition plan) gave rise to a prior fiduciary relationship which encompassed the subsequent Dyckman transaction, the *Tarrant County land deal, (the acquisition plan) could not serve to establish a sufficent prior fiduciary relationship* as to the Dyckman property for purposes of imposition a constructive trust, *since* the Tarrant County deal was *not a separate and independent dealing, unrelated to the Dyckman property at issue* before the Court. *Id.* at 948; 727 F.2d 1368, 1370.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SENTRY TITLE COMPANY, INC.,
HOME ENGINEERING, INC. and
ALAN D.WHATLEY — APPELLANTS

VS. — NO. 82-1108

TRAVIS WARD — APPELLEE

CERTIFICATE OF COUNSEL

We express the belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional public importance:

1. Whether in light of *Erie Railroad Co. v. Tompkins* it is appropriate for the panel decisions to hold that a prior fiduciary relationship sufficient to support imposition of a constructive trust must be separate, independent, and unrelated to the transaction at issue, when the recent Texas Supreme Court case in *Ginther v. Taub* relies on a line of Texas Supreme Court cases as controlling which hold that a prior fiduciary relationship which is directly related to the transaction at issue is sufficient to support imposition of a constructive trust?

2. Whether *en banc* review should be conducted since the panel decisions conflict with the controlling law of constructive trusts in Texas as enunciated by the Texas Supreme Court in the recent case of *Ginther v. Taub?*

3. Whether *en banc* review should be conducted since the panel decisions conflict with the prior panel decision in *Palmer v. Fuqua,* a decision which is consistent with and in fact relies upon the line of cases cited in *Ginther v. Taub,* for the proposition that a prior fiduciary relationship directly related to the transaction at issue is sufficient to support imposition of a constructive trust?

4. Whether pursuant to Rule 35 of the Federal Rules of Appellate Procedure, *en banc* review should be conducted to resolve the confusion created by the panel decisions which are in direct conflict with a prior panel decision and in direct conflict with controlling Texas law as enunciated by the Texas Supreme Court?

5. Whether the panel decisions' holding that a prior fiduciary relationship must be separate, independent and unrelated to the subject transaction is inconsistent with *well-established equitable reasoning and policy,* since the effect of the decisions in this case is to ignore the unchallenged and accepted fact that a prior fiduciary relationship which encompasses the subsequent property transaction herein has been breached, and is to require that imposition of a constructive trust be based upon finding that the subject transaction is not directly related to or directly within the scope of the prior fiduciary relationship?

6. Whether in light of the panel decisions it is reasonable and in accordance with *well-established equitable policy* to require that "the first time out in a fiduciary relationship with another party doesn't count," but rather a separate and independent fiduciary relationship unrelated to the subject transaction in issue must be established before imposing a constructive trust?

7. Whether in light of the panel decisions it is reasonable and in accordance with *well-established equitable policy* to require that imposition of a constructive trust be based on a prior fiduciary relationship which is separate and independent and not even related to the subject transaction?*

We further express the belief, based on a reasoned and studied professional judgment, that the panel decisions are contrary to the following decisions of the Supreme Court of Texas, the Fifth Circuit Court of Appeals and the United States Supreme Court, and that consideration of the full Court is necessary to maintain uniformity of decisions in this Court:

Ginther v. Taub, 27 Tex. S.Ct.J. 488 (July 11, 1984)

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*Importantly, we would note that even if the prior unrelated fiduciary relationship involved dealings of "the same general nature or scope as the subject transaction," *Harris v. Sentry Title Co.*, 715 F.2d 941, 948 (5th Cir. 1983), such a prior fiduciary relationship would not support a constructive trust under Texas law as is plainly evidenced by the Texas Supreme Court's holding in *Rankin v. Naftalis*, 557 S.W.2d 940 (Tex. 1977). (cited by the recent *Ginther v. Taub* case) (case held that a prior fiduciary relationship in a mineral lease transaction could not support a constructive trust on a subsequent mineral lease transaction, since the subsequent transaction in that case was not directly related to or thus within the scope of the fiduciary relationship pertaining to the particular prior mineral lease transaction in that case).

Huffington v. Upchurch, 532 S.W.2d 576 (Tex. 1976); 523 S.W.2d 44 (Tex.Civ.App. 1975).

Rankin v. Naftalis, 557 S.W.2d 949 (Tex. 1977)

Broussard v. Southern Pacific Transportation Co., 665 F.2d 1387 (5th Cir. 1982)

Palmer v. Fuqua, 641 F.2d 1146 (5th Cir. 1981)

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1937)

HIRAM C. EASTLAND, JR.

Statement of the Issues

Warranting en banc Consideration

While in all due respect, attorneys for Appellee Ward do not wish to antagonize the Court with repeated procedural requests, we sincerely feel that the recent announcement of the law regarding constructive trusts by the Supreme Court of Texas in *Ginther v. Taub,* has created the necessity of *en banc* review by the Fifth Circuit Court of Appeals.

This case presents questions of law of extreme public importance. As the Court is aware, fiduciary relationships sufficient to give rise to a constructive trust may be found in innumerable instances, regardless of whether the fiduciary obligations arise from formal relationships such as principal-agent or partnership arrangements, or informal relationships which are more than arms-length business dealings, and the relationships may be either written or oral. *Palmer v. Fuqua,* 641 F.2d 1146, 1160 (5th Cir. 1981). "The specific instances in which equity impresses a constructive trust are *numberless,*-as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." (Emphasis supplied). *Pope v. Garrett,* 211 S.W.2d 559, 560 (Tex. 1948). See also, *Omohundro v. Matthews,* 341 S.W.2d 401 (1960); *Fitz-Gerald v. Hull,* 237 S.W.2d 256 (Tex. 1951).

As shown below, in light of the Texas Supreme Court's recent decision in *Ginther v. Taub,*[1] there can be no doubt that

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[1]27 Tex. S.Ct.J. 488 (July 11, 1984). For the Court's convenience the opinion is attached hereto as Exhibit "A".

the panel decisions herein are in direct conflict with the controlling law of Texas on prior fiduciary relationships sufficient to support imposition of a constructive trust.

Likewise, as shown below, the recent decision and the line of other Texas Supreme Court cases relied upon therein, irrefutably demonstrate the fact that the panel decisions are in direct conflict with this Court's prior panel decision in *Palmer v. Fuqua.*[2] Indeed, this is further highlighted by the fact that the panel in *Palmer* relied upon the line of cases recently cited by the Texas Supreme Court in *Ginther v. Taub.*

Accordingly, as will be shown below, the panel decisions' clear conflict with the controlling law of Texas and with prior panel decisions within this Circuit plainly requires *en banc* review pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

COURSE OF PROCEEDINGS

On July 18, 1984, counsel for Appellee became aware of an opinion issued on July 11, 1984, by the Supreme Court of Texas in the case of *Ginther v. Taub.*

Thereupon, Appellee immediately filed a Motion to Stay or Recall the Mandate before it issued to the District Court. On July 23, 1984, the Order denying Appellee's Motion to Recall or Stay the Mandate was issued.

On July 23, 1984, the mandate was issued and on July 25, 1984, the mandate and Judgment of this Court were filed in the District Court.

While the panel was made aware of the *Ginther v. Taub* decision[3] prior to issuance of the mandate, the panel summarily denied reconsideration of the present cause to review the recent Texas Supreme Court decision. The panel likewise denied Appellee's request to brief the issue of prior fiduciary relationships sufficient to give rise to constructive trusts, as clarified by the Texas decision.

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[2]641 F.2d 1146 (5th Cir. 1981).

[3]See Appellee's Motion to Stay or Recall Mandate upon Intervening Decision of Supreme Court of Texas. (Appendix AA).

Accordingly, there can be no doubt that the only recourse for a full and fair consideration of the above critical issue is review by this Court sitting *en banc*.

ARGUMENT

I. A COMPARISON OF GINTHER V. TAUB TO THE PANEL DECISIONS REVEALS THE NECESSITY OF EN BANC REVIEW SINCE THE PANEL DECISIONS ARE IN DIRECT CONFLICT WITH THE MOST RECENT TEXAS SUPREME COURT CASE RECOGNIZING CIRCUMSTANCES APPROPRIATE FOR IMPOSITION OF CONSTRUCTIVE TRUSTS.

A. GINTHER V. TAUB SPECIFICALLY RECOGNIZES A LINE OF TEXAS SUPREME COURT CASES UPHOLDING IMPOSITION OF CONSTRUCTIVE TRUSTS WHERE THE TRANSACTION AT ISSUE IS DIRECTLY RELATED TO A PRIOR FIDUCIARY RELATIONSHIP.

While, as discussed below,[4] the panel decisions plainly hold that a prior fiduciary relationship sufficient to support imposition of a constructive trust must be a separate and independent fiduciary relationship *unrelated* to the transaction at issue, the recent Texas Supreme Court decision in *Ginther v. Taub* sets out Texas law that is directly to the contrary.

In discussing circumstances wherein it is appropriate to impose a constructive trust under Texas law, the Texas Supreme Court in *Ginther v. Taub* specifically referred to its earlier decision in *Rankin v. Naftalis*[5] as providing the applicable controlling standard for determining when a prior fiduciary relationship is sufficient to support imposition of a constructive trust.

Importantly, *Rankin v. Naftalis* and the line of Texas Supreme Court authorities relied upon therein, expressly hold that it is appropriate to impose constructive trusts where the transaction at issue is *directly related* to a prior fiduciary relationship.

Rankin involved the issue of whether the existence of a prior fiduciary relationship as to a particular oil and gas lease was suf-

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[4]See discussion under Subtitle B, *infra*, at 6.

[5]557 S.W. 2d 940 (Tex. 1977).

ficient to support imposition of a constructive trust as to a subsequent oil and gas lease. In reviewing the agreement relating to the first oil and gas lease the Court found that while:

> the relationship between the parties in the [first] lease was fiduciary in character, the fiduciary duties extended only to dealings within the scope of the underlying relationship of the parties; joint ventures for the *development of a particular oil and gas lease*. (Emphasis supplied).

Rankin v. Naftalis, supra at 944.

Thus, since the transaction at issue, the subsequent lease, was considered by the Court to be separate, independent, and unrelated to the first lease, the prior fiduciary relationship established by the first lease was not sufficient to support the imposition of a constructive trust as to the transaction in issue, the subsequent lease.

Significantly, however, the Court acknowledged that:

> *Had the alleged impropriety* [as to the subsequent lease] *been within the scope of these activities [regarding the prior lease]* . . . a breach of the fiduciary relationships would have occurred and the resulting or *constructive trusts remedy would be imposed*. (Emphasis supplied).

Id.

Clearly, therefore, as emphasized by the Texas Supreme Court in *Rankin*, when the transaction at issue is directly related to a prior fiduciary relationship, and is therefore, within the scope of that prior fiduciary relationship, imposition of a constructive trust is warranted.

Importantly, in reaching the above conclusion, the Court in *Rankin* also relied on other cases specifically supporting the imposition of a constructive trust in instances where the transaction at issue was *directly related* to a prior fiduciary relationship.

For example, as pertinent to the instant suit, the Texas Supreme Court distinguished the transaction in *Rankin* from *Huffington v. Upchurch*[6], on the basis that ". . . [Rankin] is not a case in which the original contract embraced the general business for the

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[6]532 S.W.2d 576 (Tex. 1976)

continued acquisition of mineral lands...", as was the case in *Huffington v. Upchurch. Rankin, supra* at 943 (citing *Huffington v. Upchurch).* The Court found that the fiduciary relationships in *Rankin* related only to the development of a particular oil and gas lease.

Huffington v. Upchurch was an action wherein the District Court had imposed a constructive trust in favor of the plaintiff in relation to an agreement for acquisition of mineral lands. In reviewing the lower court decision,[7] the Texas Supreme Court found that the partnership agreement provided that the parties were *free to conduct ". . . any other business transaction not directly related to the business of acquiring mineral leases* and other mineral or royalty interests and the exploration of and production of oil, gas and other minerals. . ." (Emphasis supplied).[8]

Importantly, the Texas Supreme Court further found, however, that the *transaction at issue was directly related to the prior fiduciary relationships arising out of the agreement to acquire mineral leases*, holding that "[i]t is undisputed that the Indonesian venture[9] [the transaction at issue before the Court] fell within the nature of the partnership business..."[10] The Supreme Court thus affirmed the District Court's imposition of a constructive trust on the basis that the transaction at issue was directly related to and violated the prior fiduciary relationship to acquire mineral lands.[11]

There can be no doubt, therefore, that the recent Texas Supreme Court decision in *Ginther v. Taub*, and the line of authorities relied upon therein, bring clearly into focus the fact that Texas law plainly recognizes the appropriateness of impos-

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[7]523 S.W.2d 44 (Tex. Civ.App. 1975).

[8]*Id.* at 578.

[9]As analogous to the Dyckman transaction herein. As shown below, the panel decisions found that the "undisputed evidence" shows that the Dyckman transaction fell within the scope of the agreement and fiduciary relationship relating to the acquisition of 490 acres in Tarrant County, Texas.

[10]*Id.*

[11]*Eg., Huffington v. Upchurch*, 523 S.W. 2d 44 (Tex. Civ. App. 1975).

ing a constructive trust where the transaction at issue is *directly related* to a prior fiduciary relationship.

As will be shown below, the panel decisions' emphatic holding, that a transaction *directly related* to a prior fiduciary relationship is not sufficient to support imposition of a constructive trust, is directly contrary to the controlling standards applied by the Texas Supreme Court.

B. A REVIEW OF THE PANEL DECISIONS PLAINLY INDICATES THEY ARE IN DIRECT CONFLICT WITH CONTROLLING TEXAS LAW SINCE THEY EMPHATICALLY HOLD THAT A TRANSACTION DIRECTLY RELATED TO A PRIOR FIDUCIARY RELATIONSHIP IS INSUFFICIENT TO IMPOSE A CONSTRUCTIVE TRUST AND THAT TEXAS LAW REQUIRES A SEPARATE AND INDEPENDENT PRIOR FIDUCIARY RELATIONSHIP UNRELATED TO THE TRANSACTION AT ISSUE.

An examination of the panel decisions in comparison with the above Texas Law, enunciated by the Texas Supreme Court, plainly reveals that the decisions are in direct conflict with the controlling Texas law. While specifically recognizing that the Dyckman transaction, the transaction at issue, is *directly related* to a prior fiduciary relationship, the panel decisions emphatically held that such a fiduciary relationship cannot support imposition of a constructive trust, since the panel construes Texas law to mean that there must be a separate and independent fiduciary relationship *unrelated* to the transaction at issue.

To the contrary, the line of authorities cited by *Ginther v. Taub* specifically hold that the subject transaction *must be* within the scope of, or thus, directly related to the prior fiduciary relationship. *Rankin, supra; Huffington, supra;* Accord, *Palmer, supra;* at 1155 (5th Cir. 1981) (citing *Rankin*); Accord, *Harris*, 727 F.2d 1368 at 1372 (Dissenting Opinion, Judge Will citing *Rankin* (which is now also cited by *Ginther v. Taub*) for the proposition that the panel decisions' requirement, that the prior dealings giving rise to the prior fiduciary relationship relied upon must be "separate" from the subject transaction, conflicts with the requirement in *Rankin* that "a constructive trust *may only be im-*

posed when the subject transaction is within the scope of the parties' *prior dealings*." *Harris, supra* at 1372).[12]

The patent conflict now clearly brought into focus with the Texas Supreme Court's decision in *Ginther v. Taub* and the authorities cited therein, is best illustrated by the words of the panel decisions themselves. For example, the panel made the following crucial findings related to, or within the scope of, a prior fiduciary relationship:

> The findings of the district court confirm that the *confidential relationship* between Whatley and Ward first *arose* when Ward became interested in the *490 acres*, and that "the *agreement to buy the Dyckman property* [the transaction in question] was clearly *within the scope of that prior agreement* and made in furtherance of the prior agreement." (Emphasis supplied).
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> . . .
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> First, it is clear from the *undisputed evidence* that the acquisition of the Dyckman tract was part of the overall scheme to acquire the 490 acres. (Emphasis supplied).
>
> *Harris v. Sentry Title Co.*, 715 F.2d 941, 948 (5th Cir. 1983)

. . .

[12]It appears that the panel decisions' requirement that a sufficient prior fiduciary relationship must arise from prior dealings which are separate, independent, and unrelated to the subject transaction, stems from a misreading of the language in *Consolidated Gas and Equipment Co. v. Thompson*, 405 S.W.2d 333, 336 (Tex. 1966), which states that "[f]or a constructive trust to arise there must be a fiduciary relationship before and apart from, the agreement made the basis of the suit." As is evidenced, for example, by *Rankin, supra* at 1944, and the Fifth Circuit in *Palmer, supra* at 1155, 1159-1160, two cases which cite *Consolidated Gas*, yet require that the subject transaction ["the agreement made the basis of the suit"] be within the scope of, or thus, directly related to a prior fiduciary relationship, the *Consolidated Gas* language simply means that prior to the agreement, transaction, or dealings made the basis of the suit, [here the Dyckman transacton], there must be prior dealings giving rise to a fiduciary relationship, [here the 490 acre acquisition plan], and in accordance with *Rankin*, the subject transaction or agreement must be within the scope of the prior dealings giving rise to a fiduciary relationship. *Accord, Harris*, 727 F.2d at 1372 (Dissenting Opinion); *Accord, Harris*, 715 F.2d at 954, 956. (Dissenting Opinion).

> As the facts clearly reveal, the relationship of *trust and confidence* between Ward and Whatley *began with the dealings* related to Whatley ... on the *490 acre tract* owned by Tarrant County. Both of *the other [subsequent] real estate dealings* in question *are directly tied into that fundamental transaction*. (Emphasis supplied).
>
> *Harris v. Sentry Title Co., Inc.*, 727F.2d 1368, 1370 (5th Cir. 1984).
>
> . . .
>
> *The land deal which is at issue in this case, the Dyckman tract deal, was directly related to the undertaking to purchase the Tarrant County tract.* It was understood between the parties that if Ward could obtain the Dyckman land, ... it might help Ward in his dispute with Tarrant County concerning the bidding on the 490 acre tract. *One could hardly imagine a more close knit relationship between the Dyckman tract deal and the original Tarrant County bidding.* (Emphasis supplied).

Id.

While recognizing the fact, as analogous to the analysis of the above *Ginther, Rankin* and *Huffington* cases, that the prior fiduciary relationship herein is *directly related* to the Dyckman transaction, the panel decisions erroneously and emphatically held that a prior fiduciary relationship sufficient to support a constructive trust must be "*unrelated* to the subject transaction." (Emphasis supplied). *Sentry Title, supra* at 948.

In construing Texas Law regarding prior fiduciary relationships sufficient to support a constructive trust, under a section of the initial opinion entitled "Constructive Trust-Principles Applied/A. Prior history of *unrelated dealings*" (Emphasis supplied),[11] the panel held that "[t]o show a constructive trust, a plaintiff must first show . . . that the parties had a long-

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[11] *Id.* at 948

standing[14] *fiduciary* or *confidential, trusting relationship unrelated* to the subject transaction."[15]

Upon acknowledging the "undisputed evidence" that the Dyckman transaction was within the scope of the prior agreement and fiduciary relationship relating to an acquisition plan to acquire 490 acres owned by the Tarrant County Water Board, the panel, in clear conflict with the above Texas Supreme Court decisions, held as follows:

> It is of *compelling significance* in this case that the dealings between Ward and Whatley were *not prior unrelated dealings* in real property. Rather, they *were all part of a single master plan to acquire the 490 acres.* Ward and Whatley had had no business dealings with each other prior to the arrangements to acquire the 490 acres. The findings of the district court confirm that the *confidential relationship* between Whatley and Ward *first arose* when Ward became interested in the *490 acres*, and that "the agreement to buy the *Dyckman property was clearly within the scope of that prior agreement and made in furtherance of the prior agreement.*" Under such a view, it was clearly erroneous for the district court to suggest[16] that there was any confidential or fiduciary relationship between the two parties before the overal scheme developed. (Emphasis supplied).

Sentry Title, supra at 948.

The panel further explained its ruling in a subsequent decision issued March 12, 1984, stating that:

> ...there *must be a pre-existing confidential relationship* of trust and confidence between the parties *before the dealings which give rise to a constructive trust.* There

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[14]The panel later deemphasized the long-standing aspect of its ruling in its second opinion dated March 12, 1984.

[15]*Id.*

[16]We would note that the District Court did not make such suggestion. See generally, District Court Finding of Fact No. 24 and Conclusion of Law No. 7 (Attached hereto as Exhibit "C").

> was no such pre-existing relationship in this case. As the facts clearly reveal, *the relationship of trust and confidence* between Ward and Whatley *began with the dealings relating to . . . the 490 acre tract* owned by Tarrant County. Both of the *other [subsequent] real estate dealings in question* are *directly tied* into that fundamental transaction. They are *not separate and independent dealings*. (Emphasis supplied).
>
> . . .
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> *The Tarrant County land deal cannot serve to establish a pre-existing relationship for the Dyckman land deal.* (Emphasis supplied).
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> . . .
>
> *...since it [the Dyckman transaction] was not based upon a pre-existing and confidential relationship* involving *separate and independent relations* between the parties, the Statute of Frauds applied with full force to that deal, and no constructive trust could be created. (Emphasis supplied).

727 F.2d at 1370.

Accordingly, *en banc* review is required in this matter since the panel decisions are plainly in conflict with *Ginther v. Taub*, *Rankin v. Naftalis*, and *Huffington v. Upchurch*, the controlling law of Texas on prior fiduciary relationships sufficient to support imposition of a constructive trust.

C. A COMPARISON OF THE PRIOR PANEL DECISION IN PALMER V. FUQUA TO THE PANEL DECISIONS HEREIN, DEMONSTRATES THE NECESSITY FOR EN BANC REVIEW TO RESOLVE THE BLATANT CONFLICT BETWEEN THE PANELS REGARDING SUFFICIENT PRIOR FIDUCIARY RELATIONSHIPS.

A review of *Palmer v. Fuqua*, a prior Fifth Circuit panel decision construing Texas law on prior fiduciary relationships sufficient to support imposition of constructive trusts, reveals that the *Palmer* decision is consistent with, and indeed, relies upon the line of Texas Supreme Court cases recently set forth as controlling by the Texas Supreme Court in *Ginther v. Taub*. The

panel decision in *Palmer* is thus, directly in conflict with the panel decisions herein, thereby requiring *en banc* review.

The *direct conflict* between the panel decision in *Palmer* and the panel decisions herein, is *best illustrated* by an *application of the legal standard* imposed by the panel decisions in *Harris v. Sentry Title, to the facts* in *Palmer*.

As previously discussed, the panel decisions held that there must be a prior fiduciary relationship which is separate, independent, and unrelated to the transaction at issue before it is appropriate to impose a constructive trust.

Importantly, an application of this legal standard to the facts in *Palmer* yields a result directly contrary to the panel decision in *Palmer* which recognized the appropriateness of imposing a constructive trust.

Palmer v. Fuqua involved an attempt by the plaintiff to impose a constructive trust on the acquisition of an oil and gas lease, the Ritchie Lease. The Court found that there was a prior relationship existing between the parties which was fiduciary in nature[1] but stated that the question remained:

> ...whether the Ritchie lease fell within the scope of their fiduciary relationship.

Palmer, supra at 1155.

In finding that the original agreement giving rise to the fiduciary relationship "...embraced the acquisition of the Ritchie lease," the transaction at issue before the Court, the panel concluded that it was appropriate to impose a constructive trust. *Id.* at 1157-1158. The panel thus, plainly imposed a constructive trust in a matter where the transaction in issue was directly related to or within the scope of a prior fiduciary relationship.

Importantly, however, application of the standard utilized in the panel decisions herein in *Harris v. Sentry Title*, to the *Palmer*

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[1]The prior fiduciary relationship in *Palmer* arose out of a partnership agreement.

As pertinent to this suit we would note that, as previously discussed, the panel decisions accepted the fact that there was a fiduciary relationship existing regarding the acquisition of 490 acres and that the subsequent Dyckman acquisition was within the scope of that fiduciary relationship.

case, would give rise to an entirely different conclusion by the Court. In finding that the original agreement "... embraced the acquisition of the Ritchie lease", the panel decisions herein would clearly conclude that it is inappropriate to impose a constructive trust, since it would not be supported by a separate and independent fiduciary relationship unrelated to the transaction at issue.

Indeed, the panel decision herein, as in *Palmer*, recognized that:

> the *confidential relationship* between Whatley and Ward first *arose* when Ward became interested in the *490 acres* [the Tarrant County land deal] and that the *"agreement to buy the Dyckman property* [the agreement made the basis of this suit] was *clearly within the scope of that prior agreement* and made in furtherance of the prior agreement." (Emphasis supplied).

Harris v. Sentry Title Co., supra at 948.

Contrary to *Palmer*, however, the panel decisions concluded that:

> ...there must be a pre-existing confidential relationship of trust and confidence between the parties before the dealings which give rise to a constructive trust. There was no such pre-existing relationship in this case. As the facts clearly reveal, the relationship of trust and confidence between Ward and Whatley began with the dealings relating to...the 490 acre tract owned by Tarrant County. Both of the other real eastate dealings in question are directly tied into that fundamental transaction. They are not separate and independent dealings.
>
> . . .
>
> The Tarrant County land deal cannot serve to establish a pre-existing relationship for the Dyckman land deal.
>
> . . .
>
> ...since it [the Dyckman transaction] was not based upon a pre-existing confidential relationship involving separate and independent relations between the parties, the Statute of Frauds applied with full force to that deal, and no constructive trust could be created.

727 F.2d at 1370.

Thus, it is clear that an application of the legal standards of the panel decisions herein, to the facts of *Palmer*, would yield an entirely different conclusion.

Finally, as consistent with the controlling *Ginther v. Taub* line of cases on the sufficiency of prior fiduciary relationships, we would note that the panel in *Palmer* even specifically relied on *Huffington v. Upchurch* and *Rankin v. Naftalis*, for the proposition that a prior fiduciary relationship directly related to the transaction at issue is suficient to support imposition of a constructive trust.

For example, as pertinent to the panel's reliance on *Rankin*, the Court stated that:

> It is clear then that the *relationship between* Palmer and J. B. Fuqua *was fiduciary* in nature-the *question remains, however, whether the Ritchie lease fell within the scope of their fiduciary relationship*. It is *only if* the alleged impropriety was *"within the scope of the underlying relationship* of the parties" *that there is a breach of fiduciary duty justifying* the imposition of a *constructive trust. Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977). (Emphasis supplied).

Palmer, supra at 1155.

Likewise, in stating that the cause in *Palmer* was very similar to *Huffington v. Upchurch, supra*, the panel in *Palmer* found that:

> The Texas Supreme Court later characterized the *Huffington* case as one "in which the original contract embraced the general business for the continued acquisition of mineral lands." *Rankin*, 557 S.W.2d at 943. In the instant case, the original contract embraced the acquisition of property within the area of interest owned by the partnership. Thus, the original contract embraced the acquisition of the Ritchie lease.
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> . . .
>
> Just like the improper acquisition in *Huffington*, the venture in the instant case-the acquisition of the Rit-

> chie lease-fell within the nature of the partnership business...And just as the imposition of a constructive trust was proper there, it is also proper here.

The panel concluded that "[a]s long as a fiduciary relationship which encompasses the property at issue is established, a constructive trust may be imposed irrespective of a failure to meet the requirements of the Statute of Frauds." *Id.* at 1160.

II. EN BANC REVIEW IS REQUIRED IN THIS MATTER SINCE THE UNITED STATES SUPREME COURT REQUIRES THAT DECLARATIONS BY A STATE'S HIGHEST COURT ARE CONTROLLING AS TO STATE LAW ISSUES, THE FIFTH CIRCUIT REQUIRES THAT PANEL DECISIONS THAT ARE INCONSISTENT WITH STATE SUPREME COURT DECISIONS OR IN CONFLICT WITH PRIOR PANEL DECISIONS, BE VACATED, AND RULE 35 OF THE FEDERAL RULES OF APPELLATE PROCEDURE REQUIRES EN BANC REVIEW TO RESOLVE THE *CONFUSION CREATED WHEN THESE POLICIES ARE VIOLATED.*

The United States Supreme Court's landmark decision of *Erie Railroad Co. v. Tompkins, supra*, plainly requires that the Texas Supreme Court's most recent decision of *Ginther v. Taub* be applied in the instant proceeding as the controlling law regarding imposition of a constructive trust since the court is obligated to apply that state's law as declared by its highest tribunal.

In light of *Ginther v. Taub* and the line of cases relied upon therein, there can be no doubt, that the legitimacy of the panel decisions' emphatic holding, that a fiduciary relationship directly related to the subject transaction is insufficient to support imposition of a constructive trust, has been called into serious question.

Under such circumstances, not only the dictates of *Erie*, but indeed, the policy of the Fifth Circuit Court of Appeals itself, require that *en banc* review be conducted and the panel decision vacated. *Edwards Co., Inc. v. Monogram Industries, Inc.*, No. 82-2019 (5th Cir. 1984); *Broussard v. Southern Pacific Transportation Co.*, 665 F.2d 1387, 1389-1390 (5th Cir. 1982).

Furthermore, where a panel decision is in apparent conflict with a prior panel decision of the Court, and the *decision cannot be justified on the basis of subsequent changes in state law,* this Court has held that *en banc* review is required to resolve the apparent conflict or confusion resulting from the decision. *Id.* As pertinent to this policy we would note, as recognized by Judge Will, in his dissenting opinion:

> The majority also suggest that because the Dyckman acquisition was "directly related" to the parties prior dealings and was not "separate and independent" from those prior dealings, somehow the pre-existing fiduciary relationship will not, under Texas law, support a constructive trust. *I can find no Texas case so holding.* (Emphasis supplied).

Importantly, we would further note that in light of the line of cases relied upon by *Ginther v. Taub*, and the new light thereby shed on this court's decision in *Palmer, supra*, it is clear that there are no cases holding as did the panel. Rather, the controlling line of cases in Texas hold that a transaction *directly related* to a prior fiduciary relationship is *specifically recognized as sufficient* to support imposition of a constructive trust.

Accordingly, in all due respect, regardless of whether the Court has agreed or disagreed with Appellee Ward's argument as to the merits[18] of his cause up to this point, there can be no doubt that *en banc* review is now required[19] in this matter. There is simply no way to reconcile the fact that the Texas Supreme Court recognizes the appropriateness of imposing constructive trusts in transactions at issue which are *directly related* to a prior

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[18]We would note that the only issue before the Court at this time is whether there is sufficient cause for an en banc review such as here, where there is apparent conflict with the Texas Supreme Court, and the prior panel decisions. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247 262 (1953); *Nash v. Estelle*, 597 F.2d 513, 532 (5th Cir. 1979).

[19]We would note that the rule that one panel cannot overrule another panel, and that *en banc* review must be conducted to resolve conflicts, "applies with equal force to cases in which state law supplies the substantive rule of decision..." *Broussard, supra* at 1389. Likewise, in any event, FRAP 35 mandates that conflicts with U.S. Supreme Court precedent such as *Erie* are matters for *en banc* review.

fiduciary relationship. Moreover, the decisions of this Circuit on this issue conflict and, at the very least, create substantial confusion in an area of extreme public importance.

CONCLUSION

WHEREFORE, for all the reasons stated herein, *and as illustrated in Appendix B,*[20] Appellee Ward respectfully requests that the decision be vacated in order that *en banc* review may be conducted by this Honorable Court.

Respectfully submitted,

TRAVIS WARD

BY: _____

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[20]Importantly, *we would likewise refer the Court to Appendix B for an illustrative summary comparison of the significant points of the pertinent Texas Supreme Court and panel decisions highlighting the fact that a conflict exists for purposes of en banc review.*

CERTIFICATE OF SERVICE

I, Hiram C. Eastland, Jr., do hereby certify that a true and correct copy of the above and foregoing instrument has this day been placed in the United States Mail, certified, return receipt requested, to:

J. Albert Kroemer, Esq.
J. Michael Tibbals, Esq.
Vetter, Bates, Tibbals, Lee & Debusk
2648 One Main Place
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David Crump, Professor of Law
South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002

DATED this the 21st day of August, 1984.

_____

HIRAM C. EASTLAND, JR.

APPENDIX G

OPINIONS OF THE SUPREME COURT OF TEXAS

WILBUR I. GINTHER ET AL. vs.

HENRY J. N,TAUB

No. C-1218

From Webb County, Ninth District.

Writ of error granted July 21, 1982. (25 Tex. Sup. Ct. Jour. 450) (Opinion of CA, 631 S.W. 2d 775).

Judgment of the court of appeals is reversed and judgment of the trial court is modified, and as modified affirmed. (Opinion by Justice Campbell.)

For Petitioners: Baker and Botts, Thomas M. Phillips and Louis L. Bagwell, Houston, Texas. Mann, Dickinson and Saldana, Lawrence A. Mann, Laredo, Texas.

For Respondent: Liddell, Snapp, Zivley, Brown and LaBoon, W. Robert Brown, Houston, Texas. Sheinfeld, Maley and Kay, Joyce Cox and Sam Levy, Houston, Texas, Oscar Pena, Laredo, Texas.

This is a suit to impose a constructive trust on an oil and gas lease and to collect actual and exemplary damages. Wilbur Ginthur and Howard Warren sued Henry Taub and William MacNaughton. They alleged as one ground of recovery the narrow constructive trust exception to the rule that land titles may not rest in parol. This rule applies when an abuse of an existing confidential relationship is established by "strict proof of a prior confidential relationship and unfair conduct or unjust enrichment on the part of the wrongdoer." *Rankin v. Naftalis,* 557 S. W. 2d 940, 944 (Tex. 1977). On the jury's verdict, the trial court rendered judgment for plaintiffs. The court of appeals reversed and rendered judgment that plaintiffs take nothing against Taub,[1] holding there was no evidence to support the jury's finding Taub was in a confidential relationship with Ginther and Warren. 631 S. W. 2d 775. We reverse the judgment of the court of appeals,

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[1]MacNaughton did not appeal the portion of the trial court's judgment awarding actual and exemplary damages against him.

modify the judgment of the trial court, and as modified, affirm the trial court's judgment.

We do not reach the one ground of recovery addressed by the court of appeals. In the court of appeals, Ginther and Warren presented five alternative theories, supported by jury findings, for upholding a judgment in their favor. The alternative grounds are independent of the confidential relationship theory and were not addressed by the court of appeals. Because we dispose of the case on one of these alternative grounds, we recite the jury findings and evidence supporting it, without addressing other issues in the case.

Ginther and Warren were independent oilmen who, in 1969, acquired a 2,716-acre mineral lease in Webb County known as the Alexander Lease. The dealings of the parties in the Alexander Lease form the basis for the dispute.

Ginther and Warren had maintained their business relationship as oil developers for over 40 years. The oil glut of the late 1960s and early 1970s caused them severe financial difficulties. By 1972 their financial position had so deteriorated that they needed outside cash to pay the delay rentals to keep the Alexander Lease in force.

The delay rentals of approximately $2700 per year were due on February 17, 1972. Shortly before that due date, Ginther and Warren contacted Taub for help. They offered Taub one-third of the lease in return for his payment of the 1972 delay rentals. Taub accepted and Ginther and Warren conveyed the one-third interest. Taub's ownership of this one-third interest is not disputed.

After Taub became a part owner in the Alexander Lease, the financial condition of Ginther and Warren continued to deteriorate. In late 1972 they retained William MacNaughton, an attorney with expertise in both bankruptcy and oil and gas law. MacNaughton advised Ginther and Warren to file a Chapter XI bankruptcy rearrangement. Under the reorganization, the bankruptcy court controlled the Ginther and Warren assets.

Taub also knew MacNaughton. Although Taub used other attorneys, Taub was one of MacNaughton's long-time clients. In addition, Taub and MacNaughton were business associates.

The problems with the Alexander Lease began in February 1973, shortly before Naughton misrepresented to Ginther and Warren that they could not use their own funds to make the delay rental payments during the Chapter XI proceedings. MacNaughton also told Ginther and Warren they could not make the delay rental payments out of the bankruptcy trust account even though the signed order prepared by MacNaughton and approved by the bankruptcy court specifically authorized such payments.

In desperation to keep the Alexander Lease alive, Ginther asked Warren to contact Taub to work out a deal for Taub to pay all the delay rentals. A few days before the lease expired, Warren finally contacted Taub by Telephone. Warren orally agreed that if Taub would pay the rentals due on the Alexander Lease on February 17, 1973, Ginther and Warren would assign all of their interest to him subject to their right of reacquisition by reimbursing Taub for their share of the delay rentals within six months. This agreement was patterned on the so-called "Exxon deal" that Ginther and Warren had used over the years in some of their dealings with Exxon's exploration and production subsidiary. Ginther, Warren and Taub had several long-standing similar relationships involving pre-existing Exxon-type deals. All parties fully understood what an "Exxon-type deal" meant. Taub paid the delay rentals.

The evidence was disputed as to the reason, but on March 6, 1973, MacNaughton prepared and Ginther and Warren executed an assignment of only one-sixth (16 2/3%) of the Alexander Lease to Taub. There was no mention in the assignment or in any collateral document of any reacquisition right. The order prepared by MacNaughton and approved by the bankruptcy court authorized only this one-sixth conveyance, with no mention of any reacquisition rights.

When and how strenuously Taub objected to the March 6th assignment as not being the agreement was hotly disputed at trial. The jury found that on August 15th Taub orally represented to Ginther and Warren that they could keep the one-half interest they claimed (and to which the recorded documents indicated would be "at rest." Taub subsequently confirmed that representation by a letter dated August 17, 1973. Ginther and Warren

testified that all dispute ended after this August settlement, until Taub again raised it in December.

Unknown to Ginther and Warren, the "dispute" over ownership of the one-half interest in the lease was kept alive in communications between Taub and MacNaughton. In a letter to Taub, MacNaughton stated there had been a "mistake" and that Taub should have received the full 66-2/3% interest. MacNaughton also deleted the Alexander Lease from the bankruptcy schedule of assets and from the bankruptcy plan of arrangement without informing Ginther and Warren. On August 21, 1973, the bankruptcy court approved the plan.

By December, Webb County was enjoying an oil boom. Ginther and Warren owned rights in a Webb County gas field (the Pescadito Dome) not connected with the Alexander Lease. The Pescadito Dome interest was a prominent asset in their bankruptcy plan of arrangment. Development of the Pescadito Dome provided the prospect of returning their financial security and making the plan succeed. Taub held record title to this lease. Ginther and Warren owned an undivided equitable interest but needed Taub to execute a written assignment of their interest so they could proceed with the deal. Their agreement, known as the "Union Carbide" deal, provided Ginther and Warren to repay Taub their share of the delay rentals out of the proceeds.

With the closing of the Union Carbide deal imminent, in early December Taub contacted MacNaughton and instructed him to prepare a "correction assignment" from Ginther and Warren to him conveying their total 66-2/3% interest in the Alexander Lease. Without informing Ginther and Warren, MacNaughton prepared and dated the correction assignment December 4, 1973 (the "December 4th Assignment"). MacNaughton sent a "no charge" statement to Taub for the preparation of the assignment. The jury found that MacNaughton acted as attorney for Taub in preparing the December 4, 1973 assignment and delivering the assignment to Ginther and Warren.

On December 11th Ginther and Warren went to Taub to request execution of the documents necessary for the Union Carbide deal. Taub then reasserted that he owned the entire Alexander Lease. Though he agreed to execute the papers for the Union Carbide deal, he made the Alexander Lease dispute the

main topic of conversation. When Ginther and Warren said the question had already been settled, Taub told them, "Well, I believe if I were you boys, I'd go talk to Mr. MacNaughton tomorrow." Taub did not execute the Union Carbide deal papers at this meeting.

Ginther and Warren met with MacNaughton the next day. MacNaughton reopened the Alexander Lease dispute and induced Ginther and Warren to execute an assignment of their record one-half interest in the Alexander Lease. First, MacNaughton informed them for the first time that the Alexander Lease had been deleted from the plan of arrangement. Because of the omission, MacNaughton represented, they might have to go into Chapter XI bankruptcy again, unless they eliminated their record interest. Second, MacNaughton threatened them with loss of the Union Carbide deal. Third, MacNaughton suggested the "solution" was to transfer all of their recorded interest to Taub, who, MacNaughton represented, "will treat you better." They did not discuss what "treat you better" meant.

Ginther and Warren asked for time to think over the matter. A few days later Ginther telephoned MacNaughton to ask for an assignment to "look at." On December 17th, MacNaughton sent them the previously prepared December 4th Assignment. It recited that the March assignment contained a scrivener's error and that the interest conveyed should have been and was corrected to be 66-2/3%. MacNaughton sent a copy of the transmittal letter to Taub.

Taub forwarded the executed documents for the Union Carbide deal. Ginther and Warren finally on January 9, 1974 went to Taub's office and delivered the executed December 4th Assignment personally. Ginther told Taub, "I'm delivering this in accordance with my agreement with Mr. MacNaughton." Taub made no reply.

Ginther and Warren understood MacNaughton's representation that Taub would treat them better to mean that Taub would hold the Alexander Lease title in an Exxon-type deal. After Ginther and Warren subsequently negotiated a deal with New Hope Refineries to develop the Alexander Lease, Taub refused to reconvey the one-half interest to Ginther and Warren. This suit ensued.

The jury found that MacNaughton fraudulently induced Ginther and Waren to execute the December 4th Assignment by each of the three separate representations that they might lose the Union Carbide deal if they did not execute it, that they would be better off if they executed it. The jury also found Taub knowingly participated in MacNaughton's breach of MacNaughton's fiduciary relationship with Ginther and Warren.

We hold the jury findings of fraud by MacNaughton to benefit Taub support the imposition of the constructive trust remedy. Before explaining our holding, however, we address Taub's contention that he is entitled to a remand to the court of appeals.

In the court of appeals Taub urged that the evidence was factually insufficient to support a number of jury findings. When we determine that there is error in a judgment, we normally remand the cause to the court of appeals for it to pass on the factual points within its exclusive jurisdiction. *McKelvy v. Barber*, 381 S. W. 2d 59 (Tex. 1964). But this Court may rule on the questions of law preserved to the court of appeals. *McKelvy v. Barber*, supra. A remand to the court of appeals is not necessary unless Taub attacked the factual sufficiency of the evidence supporting at least one necessary jury finding, for each alternative theory justifying recovery.

In oral argument, counsel for Ginther and Warren stated that, to avoid a retrial, Ginther and Warren would accept judgment based on one of the five alternative grounds. In oral argument and post submission briefs, the parties have contested exactly which findings Taub questioned on factual sufficiency grounds. We look to the argument under the points to clarify the complaint made. *Fambrough v. Wagley*, 140 Tex. 577, 169 S. W. 2d 478 (1943). We have reviewed each brief Taub submitted to the court of appeals and have indulged every possible reasonable construction against a waiver of error. There is no point of error, no subpoint, and no argument under any point that the evidence was factually insufficient to support the jury's findings that MacNaughton breached his fiduciary duties to Ginther and Warren and committed fraud by his conduct inducing them to sign the December 4th Assignment.

Taub's sole position has been that a constructive trust against him cannot be imposed because of wrongdoing by MacNaughton.

We disagree. The policy against unjust enrichment mandates that Taub not be allowed to retain the property he received as the beneficiary of McNaughton's fraud. *Pope v. Garrett*, 147 Tex. 18, 211 S. W. 2d 559, 562 (1948); *see also Morris v. Morris*, 642 S. W. 2d 448, 450 (Tex. 1982). In *Meadows v. Bierschwale*, 516 S. W. 2d 125, 131 (Tex. 1974), this Court stated that constructive trusts, being remedial in character, have the very broad function of redressing wrong or unjust enrichment in keeping with the basic principles of equity and justice. In *Meadows* we further stated that a transaction may, depending on the circumstances, provide the basis for a constructive trust where one party to that transaction holds funds which in equity and good conscience should be possessed by another.

We recognize that the Statute of Frauds prohibits title to real property interests from resting in parol. However, a constructive trust based on a prior confidential relationship and unfair conduct or unjust enrichment escapes this rule. *Rankin v. Naftalis, supra.* The same rule applies in imposing the trust on a knowing or unknowing beneficiary of fraud, even though he is not the actual wrongdoer. In *Pope v. Garrett, supra,* we imposed a constructive trust on totally innocent beneficiaries of the wrongful act. Taub as a knowing participant, as found by the jury, deserves no better treatment in equity than an innocent beneficiary of wrongdoing, as in *Pope v. Garrett, supra.*

In the court of appeals Taub attacked the factual sufficiency of the evidence supporting the exemplary damages under any theory of recovery. Because counsel for Ginther and Warren requested this Court to render judgment on an alternative theory rather than face remand, we delete the recovery of exemplary damages.

We reverse the judgment of the court of appeals. We reform the judgment of the trial court to eliminate recovery of exemplary damages against Taub and, as reformed, affirm the judgment of the trial court.

ROBERT M. CAMPBELL

Justice

Opinion delivered: July 11, 1984.